1117

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 249.

CYRUS A. BROWN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES COURT IN THE INDIAN TERRITORY.

FILED FEBRUARY 26, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 595.

CYRUS A. BROWN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES COURT IN THE INDIAN TERRITORY.

INDEX.

	Original.	Print.
Caption	1	1
Grand jury empaneled	1	1
Presentment of indictment	4	2
Indictment	5	3
Order appointing attorney for defendant	10	5
Dismissal as to defendant Johnson L. Morgan	11	5
Arraignment and plea	12	6
Trial commenced	12	6
Trial concluded	13	6
Verdict	14	7
Order filing motion for new trial	14	7
Order granting motion for new trial	14	7
Second jury empaneled	15	7
Order overruling motion for continuance	17	8
Arraignment and plea	18	9
Second trial commenced	18	9
Second trial concluded	19	10
Verdict	19	10
Order filing motion for new trial	20	10
Order overruling motions for new trial and in arrest of judgment	20	10
Judgment and sentence	21	11
Order granting time to file bill of exceptions and petition for writ of error	22	11
Order filing bill of exceptions	23	12

	Original.	Print.
Bill of exceptions	24	12
Verdict (first)	24	12
Motion for continuance	25	12
Jury empaneled	30	15
Charge to jury	31	15
Verdict (second)	38	19
Motion for new trial	39	19
Motion in arrest of judgment	41	20
Judge's certificate to bill of exceptions	43	21
Petition for writ of error	44	21
Specification of errors	45	22
Assignment of errors	48	24
Writ of error	51	25
Citation	53	26
Proof of service of citation	54	26
Clerk's certificate	55	27
Petition for writ of error	56	27
Assignment of errors	60	29

1 Form No. 307.

TRANSCRIPT OF PROCEEDINGS.

UNITED STATES COURT,
Indian Territory, Northern District, ss:

At a stated term of the United States court in the Indian Territory, northern district, begun and held in the court rooms at Muskogee, in the Indian Territory, on the 1st day of December, in the year of our Lord one thousand eight hundred and ninety-six.

Present, the Hon. William M. Springer, judge of said court.

On the 1st day of December, 1896, being a regular day of said term of said court, among the proceedings had were the following, to wit:

Be it remembered that on the 1st day of December, A. D. 1896, the United States court for the northern district, Indian Territory, met in regular session at Muskogee, Indian Territory. Present: Hon. Wm. M. Springer, judge; James A. Winston, clerk; Samuel M. Rutherford, marshal, and Clifford L. Jackson, attorney.

Now comes the marshal of this court and returns into court the names of the persons summoned by him according to law to serve as grand jurors for this term of court, as follows: J. W. Patrick, Orange Fuller, Wm. L. Moore, W. C. Trent, Frank Vore, S. Barbee, George W. Green, John Marks, Connell Rogers, C. E. Foley, A. W. Robb, Wm. Beck, Sam T. Davis, Bluford Miller, C. L. Lacy, and W. A. Halsell; and for alternates the names of C. W. Phillips, E. N. Ratcliff, Fred Parkinson, R. Lee Comer, W. J. Lipscomb, and T. A. Parkinson. They are each severally called, and all answer to their names excepting C. W.
2 Phillips, E. N. Ratcliff, R. Lee Comer, C. L. Lacy, and W. A. Halsell. The following are from good cause excused from service: W. L. Moore, W. J. Lipscomb, leaving only fifteen persons of the panel. The court orders the marshal to summon one other person from the body of the district and not from bystanders to complete the panel of the grand jury. The marshal summons J. C. Banks, who now appears in open court, and is found qualified. The grand jury now being complete, as follows: J. W. Patrick, Orange Fuller, Fred Parkinson, W. C. Trent, Frank Vore, S. Barbee, George W. Green, John Marks, Connell Rogers, T. A. Parkinson, C. E. Foley, A. W. Robb, Wm. Beck, Sam T. Davis, Bluford Miller, and J. C. Banks, who are each found possessing the necessary qualification of grand jurors, and said grand jurors are now instructed as to their duties and are sworn as the law directs, and A. W. Robb is appointed foreman of said grand jury and they retire in charge of a sworn officer to consider of their presentments.

Thereafterward, on the 5th day of December, A. D. 1896, the same being one of the regular days of said term of said court, among the proceedings had was the following, to wit:

It is ordered by the court that Orange Fuller, John Marks, and C. E. Foley be, and they are hereby, excused from further duty as grand jurors at this term of court, and the marshal is ordered to summon three other

persons from the body of the district, and not from bystanders, to act as grand jurors and to report Monday morning at nine o'clock.

Thereafterwards, on the 7th day of December, 1896, the same being one of the regular days of said term of said court, among the pro-
3 ceedings had, *the proceedings had*, was the following, to wit:

The marshal returns into open court the names of W. J. Birk, F. McElsey, and Thomas Foster, who were summoned by him to complete the panel of the grand jury, made vacant Saturday by the excuse of Orange Fuller, John Marks, and C. E. Foley. Said persons appear in open court and are each found to be qualified, and they, together with the remainder of the grand jury not excused, are duly sworn by the court and charged touching their duties. A. W. Robb is appointed foreman of said grand jury, and they retire in charge of their sworn officer to continue their deliberations.

Thereafterwards, on the 8th day of December, 1896, the same being one of the regular days of said term of said court, among the proceedings had was the following, to wit:

It is ordered by the court that Connell Rogers be, and he is hereby, excused from further duty as a grand juror at this term of court. And the marshal is ordered to summon one person from the outside of the court room to serve at once as a grand juror. The marshal returns the name of Wm. Owen, who was summoned by him to complete the panel of the grand jury, made vacant by the excuse of Connell Rogers. Said person appears in open court and is found qualified, and he, together with the remainder of the grand jury not excused, are duly sworn by the court and charged touching their duties. A. W. Robb is appointed foreman of said grand jury, and they retire in charge of a sworn officer to continue their deliberations.

Thereafterwards, on the 10th day of December, A. D. 1896, the same being one of the regular days of said term of said court,
4 among the proceedings had was the following, to wit:

Now comes the grand jury into open court in charge of their sworn officer, and each of said grand jurors is severally called and all answered to their names. And through their foreman, in the presence of the grand jury, said grand jury presents to the court the following indictment, amongst others, which said indictment was ordered filed in open court in the presence of the grand jury by the clerk of this court, which was done, and which said indictment is endorsed as follows: Criminal docket, No. 3875. In the United States court in the Indian Territory, northern district. United States vs. Johnson L. Morgan and Cyrus A. Brown. Indictment for murder. A true bill. A. W. Robb, foreman of the grand jury. Filed in open court Dec. 10, 1896. Jas. A. Winston, clerk.

The grand jury, reporting that they have further business before them, retire in charge of their sworn officer to further deliberate, and it is ordered that said defendants be remanded to the custody of the marshal.

5

Form 150.

Indictment for murder in the Indian Territory.

(U. S. attorney's office, No. .) (Grand Jury No. .) Court No., 3875.

UNITED STATES OF AMERICA,
Indian Territory, Northern District, ss:

In the United States court in the Indian Territory for the northern district of said Territory, at the December term, A. D. 1896.

UNITED STATES *versus* JOHNSON L. MORGAN AND CYRUS A. BROWN, defendants.	Indictment for murder.

The grand jurors of the United States of America, duly selected, summoned, impaneled, sworn, and charged to inquire within and for the body of the northern district of the Indian Territory aforesaid, in the name and by the authority of the United States, upon their oaths do find, present, and charge that one Johnson L. Morgan and one Cyrus A. Brown, who were not then and there members of any Indian nation, on the 6th day of October, A. D. 1896, within the northern district of the Indian Territory aforesaid, with force and arms, in and upon the body of one Daniel Cutbert, then and there being, feloniously, wilfully, and of their malice aforethought did make an assault; and that the said Johnson L. Morgan and Cyrus A. Brown two certain guns then and there charged with gunpowder and two leaden bullets, which said guns they, the said Johnson L. Morgan and Cyrus A. Brown, in their hands then and there had and held, then and there feloniously, wilfully, and of their
6 malice aforethought did discharge and shoot off at, to, against, and upon the body of the said Daniel Cuthbert, and that the said Johnson L. Morgan and Cyrus A. Brown, with the leaden bullets aforesaid, out of the guns aforesaid, then and there, by force of the gunpowder aforesaid by the said Johnson L. Morgan and Cyrus A. Brown discharged and shot off as aforesaid, then and there feloniously, wilfully, and of their malice aforethought did strike, penetrate, and wound him, the said Daniel Cutbert, in and upon the left side of the back of him, the said Daniel Cutbert, giving to him, the said Daniel Cutbert, then and there, with the leaden bullets aforesaid, so as aforesaid discharged and shot out of the guns aforesaid by the said Johnson L. Morgan and Cyrus A. Brown in and upon the left side of the back of him, the said Daniel Cutbert, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound he, the said Daniel Cutbert, then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say that upon the day and year aforesaid and at the place aforesaid the said Johnson L. Morgan and Cyrus A. Brown him, the said Daniel Cutbert, in the manner and by the means aforesaid, feloniously, wilfully, and of their malice aforethought did kill and murder the

said Daniel Cutbert, not being then and there a member of any Indian nation, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Verdict:

We, the jury, find the defendant guilty of , as charged in the above count in the within indictment.

Foreman.

7 Verdict:

We, the jury, find the defendant not guilty as charged in the above count in the within indictment.

Foreman.

And the grand jurors aforesaid, upon their oaths aforesaid, do further find, present, and charge that the said Johnson L. Morgan and Cyrus A. Brown, who were not then and there members of any Indian nation, on the 6th day of October, A. D. 1896, within the northern district of the Indian Territory aforesaid, with force and arms, in and upon the body of the said Daniel Cutbert, then and there being, feloniously, wilfully, and of their malice aforethought did make an assault; and that the said Johnson L. Morgan and Cyrus A. Brown two certain pistols then and charged with gunpowder and two leaden bullets, which said pistols they, the said Johnson L. Morgan and Cyrus A. Brown, in their hands then and there had and held, then and there feloniously, wilfully, and of their malice aforethought did discharge and shoot off at, to, against, and upon the body of the said Daniel Cutbert, and that the said Johnson L. Morgan and Cyrus A. Brown, with the leaden bullets aforesaid, out of the pistols aforesaid, then and there, by force of the gunpowder aforesaid by the said Johnson L. Morgan and Cyrus A. Brown discharged and shot off as aforesaid, then and there feloniously, wilfully, and of their malice aforethought did strike, penetrate, and wound him, the said Daniel Cutbert, in and upon the left side of the back of him, the said Daniel Cutbert, giving to him, the said Daniel Cutbert, then and there, with the leaden bullets aforesaid, so as aforesaid discharged and shot out
8 of the pistols aforesaid by the said Johnson L. Morgan and Cyrus A. Brown, in and upon the left side of the back of him, the said Daniel Cutbert, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound he, the said Daniel Cutbert, then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say that upon the day and year aforesaid and at the place aforesaid the said Johnson L. Morgan and Cyrus A. Brown him, the said Daniel in the manner and by the means aforesaid, feloniously, wilfully, and of their malice aforethought did kill and murder the said Daniel Cutbert, not being then and there a member of any Indian nation, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

JAMES M. GIVENS,

Assistant United States Attorney Northern District of Indian Territory.

Verdict:

We, the jury, find the defendant guilty of as charged in the within indictment.

Foreman.

Verdict:

We, the jury, find the defendant not guilty as charged in the within indictment.

Foreman.

(Indorsed:) Criminal Docket No. 3875; in the United States court in the Indian Territory, northern district; United States vs. Johnson L. Morgan and Cyrus A. Brown; indictment for murder; a true
9 bill. A. W. Robb, foreman of the grand jury. Filed in open court Dec. 10, 1896. Jas. A. Winston, clerk.

Witnesses for the United States: A. L. Rowell, B. F. Hubbard, Thos. E. Ledbetter, Hartley, F. M., Campbell; Sam Adair; J. L. Brown; Joel Hartley; Jno. Smith; Samuel C. Minnick, Falls City, Neb.

Witnesses.

Names.	Post office address.
A. L. Rowell	Campbell, I. T.
Ben F. Hubbard	Do.
Thos. E. Ledbetter	Do.
F. M. Hartley	Do.
Sam Adair	Vian, I. T.
J. L. Brown	Do.
Joel Hartley	McKey, I. T.
Jno. Smith	Campbell, I. T.
Samuel C. Minnick	Falls City, Neb.

10 Thereafterwards, on the 11th day of December, A. D. 1896, the same being one of the regular days of said term of said court, among the proceedings had was the following, to wit:

UNITED STATES *vs.* JOHNSON L. MORGAN AND CYRUS A. BROWN. } No. 3875. Indictment for murder.

J. H. Koogler, esq., a regular practicing attorney, is hereby appointed attorney for the defendants herein.

11 Form No. 307.

TRANSCRIPT OF PROCEEDINGS.

UNITED STATES COURT,

Indian Territory, Northern District, ss:

At a stated term of the United States court in the Indian Territory, northern district, begun and had in the court rooms at Muskogee, in the Indian Territory, on the 4th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Hon. Wm. M. Springer, judge of said court.

On the 4th day of May, 1897, being a regular day of said term of said court, among the proceedings had were the following, to wit:

Be it remembered that the United States court in the Indian Territory, northern district, met in regular session at the court rooms at Muskogee, Indian Territory, on the 4th day of May, A. D. 1897, present: Hon. Wm. M. Springer, judge; James A. Winston, clerk; Samuel M. Rutherford, marshal, and Pliny L. Sopher, attorney. Court having been opened in due form of law, the following proceedings were had, to wit:

On the 15th day of July, A. D. 1897, the same being one of the regular days of said term of said court, court met, present: Hon. John R. Thomas, judge of the United States courts in the Indian Territory, and the following, among other proceedings, were had, to wit:

THE UNITED STATES, *vs.* JOHNSON L. MORGAN AND CYRUS A. BROWN. } No. 3875. Indictment for murder.

12 Comes now the United States by the district attorney, and the defendants also come, each in his proper person and attended by counsel, and on motion of the district attorney this case is dismissed without prejudice as to the defendant, Johnson L. Morgan.

Thereafterwards, on the 16th day of July, A. D. 1897, the same being one of the regular days of said term of said court, present, Hon. John R. Thomas, judge, the following among other proceedings were had, to wit:

THE UNITED STATES, *vs.* CYRUS A. BROWN. } No. 3875. Indictment for murder.

On this day come the United States by the district attorney, and come the said defendant, Cyrus A. Brown, in his proper person, in custody of the marshal, and attended by counsel, and it appearing from the return of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause, and a full and complete list of the witnesses in this case, together with their post-office addresses; and that he has also been served with a full and complete list of the panel of the petit jury for this term of court, together with their post-office addresses, more than two entire days heretofore, and the said defendant now being duly arraigned for plea, says that he is not guilty as charged in the indictment, and puts himself upon the country; whereupon it is ordered that a jury come to try the issue joined; whereupon, after challenge by both plaintiff and defendant, the following were selected for the trial of this cause, to wit: Heck Robbins, B. J. Vaughan, J. M. Hutchison, Wm. E. Whitsett, A. H. Berry, A. J. Howard, John E. Newberry, James L. Brown, W. H. Brown, W. B. Dur-

13 ham, J. B. Muhler, and Harry Menzemer, twelve good and lawful men of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence; and after hearing a sta'ement of the case, and some evidence, and there not being time to further progress in the trial of this cause, the jury were put in charge of a sworn bailiff of this court. And

it is further ordered by the court that said jury be kept together and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

Thereafterwards, on the 17th day of July, A. D. 1897, the same being one of the regular days of said term of said court, present, Hon. John R. Thomas, judge, the following among other proceedings were had, to wit:

THE UNITED STATES)
vs.) No. 3875. Indictment for murder.
CYRUS A. BROWN.)

On this day come the United States by the district attorney, and comes the said defendant in custody of the marshal, and by his attorneys, and now come the jury heretofore empaneled herein, in charge of a sworn bailiff of this court, viz: Heck Robbins, B. J. Vaughan, J. M. Hutchinson, Wm. E. Whitsett, A. H. Berry, A. J. Howard, John E. Newberry, James L. Brown, W. H. Brown, W. B. Durham, J. B. Muhler, and Harry Menzemer, who took their seats in the jury box, and after hearing the remainder of the evidence and the argument of counsel and receiving the instructions of the court, retired in charge of the sworn bailiff aforesaid, to consider of their verdict, and after some time returned into court in charge of the sworn bailiff aforesaid, and presented the following verdict, to wit:

14 "We, the jury, find the defendant, Cyrus A. Brown, guilty of murder as charged in the second count of the within indictment. (Signed) J. E. Newberry, foreman." Whereupon the jury was by the court discharged from the further consideration of this case, and the said defendant remanded to the custody of the marshal to await final sentence.

Thereafterwards, on the 20th day of July, 1897, the same being one of the regular days of said term of said court, present, Hon. John R. Thomas, judge, the following among other proceedings were had, to wit:

THE UNITED STATES)
vs.) No. 3875. Indictment for murder.
CYRUS A. BROWN.)

Comes the United States by the district attorney, and the said defendant, Cyrus A. Brown, also comes, in custody of the marshal, and attended by counsel, and said defendant, by his attorneys, files his motion to set aside the verdict of the jury and for a new trial in this cause.

Thereafterwards, on the 10th day of September, A. D. 1897, the same being one of the regular days of said term of said court, present, Hon. John R. Thomas, judge, the following among other proceedings were had, to wit:

THE UNITED STATES)
vs.) No. 3875. Indictment for murder.
CYRUS A. BROWN.)

Comes the United States by the district attorney, and the defendant also comes in custody of the marshal and attended by counsel, and
15 the motion for a new trial herein comes on to be heard, the court being fully advised in the premises, sustains said motion. It is

therefore ordered that the verdict heretofore rendered by the jury in this cause be, and the same is, set aside and a new trial granted in this cause. It is further ordered that said defendant be remanded to the custody of the marshal of this court.

UNITED STATES COURT,
Indian Territory, Northern District, ss:

At a stated term of the United States court, in the Indian Territory, northern district, begun and had in the court rooms at Muskogee, in the Indian Territory, on the 6th day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

Present, the Hon. John R. Thomas, judge of said court.

On the 6th day of December, 1897, being a regular day of said term of said court, among the proceedings had were the following, to wit:

Be it remembered that the United States court for the northern district of the Indian Territory, met in regular session at the court rooms at Muskogee, Indian Territory, on the 6th day of December, 1897, present, Hon. John R. Thomas, judge of the United States courts in the Indian Territory, Leo E. Bennett, marshal, Pliny L. Soper, attorney, and James A. Winston, clerk. Court having been opened in due form of law, the following proceedings were had, to wit:

The marshal returns into court the names of the persons summoned by him according to law to serve as petit jurors for this
16 present, December, 1897, term of court, and they are each severally called, and the following answer to their names: E. C. Julian, Lewis Lyons, Lewis N. B. Jobe, Lewis Miller, J. W. Graham, Ferdinand Farmer, Percy Hicks, D. N. Scott, David Dickson, W. J. McMakin, sr., R. M. Bean, J. W. Thompson, W. W. Brinks, Alvin Hodge, H. C. Hicks, T. A. Manwarring, F. P. Wells, David Berryhill, Joseph W. Bridges, Joseph Downing, Scott Gentry, and Charles Winfield, who are each examined by the court touching their qualifications, and are found possessing all the qualifications required by law, and said jury is duly sworn for the term and give their attendance, and the marshal is ordered to summon and return into court on to-morrow morning the names of eight other persons to complete the panel of the petit jury.

Thereafterwards, on the same day, December 6th, 1897, the following further proceedings were had, to wit:

For cause shown it is ordered that H. C. Hicks be and he is excused from further service as a petit juror at this term of court, and the marshal is ordered to summon one other person to fill the vacancy thus occassioned, said person to be and appear in court on to-morrow morning at nine o'clock.

Thereafterwards, on the 7th day of December, A. D. 1897, the same being one of the regular days of said term of said court, present, Hon. John R. Thomas, judge, among the proceedings had was the following, to wit:

The marshal returns into court the names of the persons summoned by him to complete the panel of the petit jury, to wit: James
17 Curtis, H. C. Lowery, R. N. Julian, E. R. Rulison, Elton Brazel, Walter Payne, J. P. Stringfield, E. Putnam, and J. C. McKenzie, who were each called and all answered to their name, and are exam-

ined by the court touching their qualifications, and are each found possessing all the qualifications required by law, and said jurors are each accepted as petit jurors for this term of court, and are sworn for the term and give their attendance.

Thereafterwards, on the 15th day of December, 1897, the same being one of the regular days of said term of said court, present, Hon. John R. Thomas, judge, the following among other proceedings were had, to wit:

THE UNITED STATES)
vs. No. 3875. Indictment for murder.
CYRUS A. BROWN.)

Comes the United States by the district attorney, and the defendant also comes, in the custody of the marshal and attended by counsel, and the said defendant files a motion for continuance herein, which said motion coming on to be heard is by the court overruled. It is ordered that an attachment issue for witness Ed. Sweeny, directed to the marshal for the district of Kansas, returnable forthwith.

Thereafterwards, on the 16th day of December, 1897, the same being one of the regular days of said term of said court, present, Hon. John R. Thomas, judge, among the proceedings had was the following, to wit:

THE UNITED STATES)
vs. No. 3875. Indictment for murder.
CYRUS A. BROWN.)

18 On this day come the United States by the district attorney, and comes the said defendant, Cyrus A. Brown, in custody of the marshal and attended by counsel, and it appearing from the return of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause, and a full and complete list of the witnesses in this case, together with their post-office addresses, and that he has also been served with a full and complete list of the panel of the petit jury for this term of court, together with their post-office addresses, more than two entire days heretofore; and the said defendant having been heretofore duly and legally arraigned, and having entered his plea that he is not guilty as charged in the indictment, he puts himself upon the country, whereupon it is ordered that a jury come to try the issue joined. Whereupon, after challenge by both plaintiff and defendant, the following were selected for the trial of this case, viz: Lewis Lyons, J. W. Thompson, Joseph Downing, R. M. Bean, J. W. Graham, David Berryhill, F. A. Manwarring, Ferdinand Farmer, F. P. Wells, W. J. McMakin, sr., Charles Winfield, and Lewis Miller, twelve good and lawful men of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence; and after hearing the statement of the case and some of the evidence, and there not being time to further progress in the trial of this cause they were put in charge of a sworn bailiff of the court. And it is further ordered by the court that said jury be kept together, and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge and return them again into court at the meeting thereof to-morrow morning at nine o'clock.

19 Thereafterwards, on the 17th day of December, 1897, the same being one of the regular days of said term of said court, present, Hon. John R. Thomas, judge, the following among other proceedings were had, to wit:

THE UNITED STATES }
vs. } No. 3875. Indictment for murder.
CYRUS A. BROWN. }

On this day come the United States by the district attorney, and the defendant, Cyrus A. Brown, also comes in custody of the marshal and attended by counsel, and also comes the jury heretofore empaneled for the trial of this case, viz: Lewis Lyons, J. W Thompson, Joseph Downing, R. M. Bean, J. W. Graham, David Berryhill, T. A. Manwarring, Ferdinand Farmer, F. P. Wells, W. J. McMakin, sr., Charles Winfield, and Lewis Miller, who took their seats in the jury box, and after hearing the remainder of the evidence and the argument of counsel and the instructions of the court, retired in charge of the sworn bailiff aforesaid to consider of their verdict, and after due deliberation returned into open court in charge of their sworn bailiff aforesaid, and returned the following verdict, to wit: "We, the jury, duly empaneled and sworn in the above-entitled cause, do find, from the law and the evidence, the said defendant, Cyrus A. Brown, guilty of murder as charged in the first count of the within indictment. (Signed) John W. Graham, foreman." Upon the request of the attorneys for the said defendant, the said jury was polled, and each one answering that this was his verdict, and that he was satisfied therewith, the said jury was discharged by the court from the further consideration of this case, and the said defendant was remanded to the custody of the marshal to await final sentence.

20 Thereafterwards, on the 20th day of December, 1897, the same being one of the regular days of said term of said court, present, Hon. John R. Thomas, judge, the following among other proceedings were had, to wit:

THE UNITED STATES }
vs. } No. 3875. Indictment for murder.
CYRUS A. BROWN. }

On this day comes the United States by the district attorney, and the said defendant also comes in custody of the marshal and attended by counsel, and said defendant, by his attorneys, files motion to set aside the verdict of the jury herein and for a new trial in this cause.

Thereafterwards, on the 24th day of December, A. D. 1897, the same being one of the regular days of said term of said court, present, Hon. John R. Thomas, judge, the following among other proceedings were had, to wit:

THE UNITED STATES }
vs. } No. 3875. Indictment for murder.
CYRUS A. BROWN. }

On this day come the United States, by the district attorney, and the said defendant also comes in custody of the marshal and attended by counsel, and the motion to set aside the verdict of the jury and for a

new trial herein, heretofore filed, comes on to be heard, and the court, being fully advised in the premises, does overrule the same, to which ruling of the court the said defendant, by his attorneys, duly excepted. And thereupon the said defendant files motion in arrest of judgment herein, which said motion coming on to be heard and the court being fully advised, the same is by the court overruled, to which action
21 of the court in overruling said motion the defendant, by his attorneys, duly excepted at the time.

Thereafterwards, on the same day, being the 24th day of December, A. D. 1897, the following further proceedings, amongst others, were had, to wit:

THE UNITED STATES }
vs. } No. 3875. Indictment for murder.
CYRUS A. BROWN. }

On motion of Pliny L. Soper, esq., attorney for the northern district of the Indian Territory, the said defendant, Cyrus A. Brown, was brought to the bar of the court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty, heretofore returned against him by the jury in this cause on the 17th day of December, A. D. 1897, should not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon the premises being seen, and by the court well and sufficiently understood, it is considered by the court that the said Cyrus A. Brown be deemed, taken, and adjudged guilty of the crime of murder, and it is ordered by the court that the said marshal of the district aforesaid cause the said Cyrus A. Brown to be taken hence, and him, the said Cyrus A. Brown, safely and securely keep from the date hereof until the 25th day of February, A. D. 1898, and on that day, between the rising and the setting of the sun of said day, the said marshal cause the said Cyrus A. Brown to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said rising and setting of the sun on the said 25th day of
22 February, A. D. 1898, cause the said Cyrus A. Brown to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended and that they have execution therefore; and the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal, with a full and true account of the execution of the same.

Thereafterwards, on the same day, being the 24th day of December, A. D. 1897, the following further proceedings, amongst others, were had, to wit:

THE UNITED STATES }
vs. } No. 3875. Indictment for murder.
CYRUS A. BROWN. }

On motion of the defendant, said defendant is granted sixty days from this date in which to prepare and file his bill of exceptions. Defendant,

on cause shown, is also granted sixty days from this date in which to file petition for writ of error.

23 Thereafterwards, on the 20th day of January, A. D. 1898, the same being one of the regular days of said December, 1897, term of said court, present, Hon. Wm. M. Springer, judge, among the proceedings had was the following, to wit:

THE UNITED STATES)
vs.) No. 3875. Indictment for murder.
CYRUS A. BROWN.)

On this day comes the defendant, by his counsel, and files his bill of exceptions, which is in words and figures as follows, to wit:

24 In the United States court for the northern district of the Indian Territory, sitting at Muscogee, December term, 1897.

UNITED STATES)
vs.) No. 3875.
CYRUS A. BROWN, DEFENDANT.)

Be it remembered that at the previous term of this court—at the May term, 1897, thereof—the following proceedings, among others, were had in this case, viz:

On the 13th day of July, 1897, a jury was duly empaneled in this case and sworn, and the defendant, Cyrus A. Brown, was tried upon the charges contained in both counts of the indictment herein. Evidence for the prosecution and the defense were heard and concluded.

On the 17th day of July, 1897, after the evidence was concluded, the court charged the jury.

After the argument by counsel, the jury retired to consider their verdict, and afterwards, and on the same day, said jury returned into court the following verdict:

"We, the jury, find the defendant guilty of murder, as charged in the second count of the within indictment.

"J. E. NEWBERRY,
"*Foreman.*"

On the 20th day of July, 1897, the defendant files his motion to set aside the verdict and for a new trial, which motion, after argument by the counsel and consideration by the court, was, on the 10th day of September, 1897, sustained and a new trial granted to defendant.

25 In the United States court for the northern district of the Indian Territory, sitting at Muscogee, December term, 1897.

UNITED STATES)
vs.) No. 3875.
CYRUS A. BROWN, DEFENDANT.)

Be it remembered that at the present term of this court, viz, the 15th day of December, 1897, the defendant in the above-entitled action filed

his motion for a continuance and postponement of said case, which motion is as follows:

In the United States court for the northern district of the Indian Territory, sitting at Muscogee.

THE UNITED STATES)
vs.) No. 3875.
CYRUS A. BROWN, DEFENDANT.)

Comes now the defendant, Cyrus A. Brown, in the above-entitled action, and moves the court to postpone and continue said case until the next term of this court, and for grounds of this his amended motion for that purpose states:

That he has been indicted in the above-entitled action for the crime of murder, and he pleads not guilty to the crime charged in said indictment; that he asks such continuance on the account of the absence of the following-named witnesses, whose evidence is material to his defense, and without whose testimony he can not safely proceed to trial, viz, MacC. Johns, of Siloam Springs, Ark.; Ed Sweeny, of Chanute, Kansas; Sam Adair, whose residence is near Vian, Indian Territory, and John S. Brown, also living near Vian, Indian Territory.

That on the 20th day of November, 1897, he had subpœnas issued for said named witnesses MacC. Johns, Ed Sweeny, and Sam
26 Adair, and placed in the hands of the marshal of the northern district, I. T., for service, but that said witnesses have not yet arrived, and are not now present; that he expects to prove by said witnesses MacC. Johns and Ed Sweeny that they are well acquainted with the defendant, and know his reputation for being a peaceable, law-abiding, and respectable citizen in the communities in which he has lived in the last four years; that such reputation is good, and defendant is not a lawbreaker and addicted to the commission of crime; that he expects to prove by the said Sam Adair that he was acquainted with the said Johnson L. Morgan, who stood jointly indicted with this defendant, but who is now made a witness for the Government; that he was one of the guards who had the said Morgan in charge when arrested, after the body of Daniel Cutbert was found, and that he had a conversation with said Morgan in which the latter admitted to him that he knew of the sinking of the body of said Cutbert in the Arkansas River, and that he knew when it was done that it would float in a few days, because he knew of a similar case which had previously occurred and the body floated.

Defendant further states that he has been in jail for over a year past; that his immediate relatives live in the States of Kansas and are people of limited means, and on account of distance and such limited means have not been able to render him assistance in looking up and obtaining testimony on his behalf; that he has neither money or property, and has been unable to furnish his attorneys with any means to look up evidence in his defense, and he believes that such evidence exists and could be procured by investigation and attention; that in giving names of persons to his attorneys to be subpœnaed as witnesses to prove his good

character as a law-abiding citizen he has sought to select such
27 persons as would be practically convenient to the court as possible, and could give competent testimony in that respect; that he selected four such persons, who are men of good standing in the communities in which they live, and three were allowed, one of whom is present, viz, S. C. Minnick; that the other two witnesses asked and allowed, viz, MacC. Johns, is a farmer living on a farm about 2½ miles east and a half a mile south of Siloam Springs, Ark., and was living there in the spring 1896; that defendant was there at that time, and the said Johns was plowing, preparatory to putting in a crop at the time defendant left there; that the witness Ed Sweeny, asked as a witness to character, lived in Chanute, Kansas, which was his home, and where his parents and family resided, and that defendant saw him there in July, 1896; and defendant states that he was arrested on the charge in the indictment in October, 1896, and has never heard that the said Johns and Sweeny has ever removed from their respective homes.

That he expects to prove by John S. Brown that he arrested Johnson L. Morgan, and can prove by the actions, language, and demeanor of said Morgan, when arrested, his excited condition and refusal to make any statement. That said witness took a bottle of strychnine from said Morgan, which had belonged to the deceased, Daniel Cuthert, and can prove by him the conversation which he had with the defendant when brought in his presence, and that such conversation indicated a knowledge of the crime on the part of said Johnson L. Morgan. Defendant further states that he had a subpœna issued for said John S. Brown as soon as he learned that the former subpœna issued by the Government had not been served and was not insisted on by the prosecution, and he believes that he can procure his attendance in a few days, and also the attendance of said Sam Adair, MacC. Johns, and Ed Sweeny
28 by the next term of this court.

Defendant further states that he placed the subpœna allowed and obtained for the above-named witnesses in the hands of the marshal of the northern district of the Indian Territory on the 20th day of November, 1897, with the request that the subpœna for the witnesses outside of the Territory be forwarded to the respective marshals in the districts indicated by their several residences, for service, which he said he would do, as that is the usual course of practice in his office. That he is informed by the said marshal that the subpœna for the witness MacC. Johns has been returned and not served; that the subpœna for Sam Adair has not yet been returned, and the subpœna for Ed Sweeny has been returned as served on Nov. 26th, 1897.

Defendant further states that he has used due diligence to procure the attendance of his witnesses, and their testimony, at this term of court; that this application is not made for delay, but that justice may be done; that the above-named witnesses are not absent by reason of any collusion, procur'ment, or connivance on his part, or by anyone else on his behalf to his knowledge; that he sought to obtain his witnesses in good faith as above set forth; that he does not know of any other witnesses other than the above-mentioned Sam Adair and John S. Brown by whom he can so fully prove the facts which he expects to prove by them as above set forth; and that he does not know of any other witnesses as

to character than the said MacC. Johns and Ed Sweeny whose attendance he can procure at this term of court; but defendant states that he believes that he can procure the attendance of said witnesses at the next term of court, or if the witnesses as to character have removed from their homes since defendant's incarceration that he can procure
29 others in their stead by the next term of *of* this court. And defendant further states that he believes the facts set forth in the foregoing motion are true.

Wherefore he respectfully asks a continuance of this case.

CYRUS A. BROWN.

KOOGLER & WATKINS,
Attorneys for Defendant, Cyrus A. Brown.

Cyrus A. Brown, being duly sworn, says that he has read the foregoing motion for continuance, and he believes the allegations made therein are true.

CYRUS A. BROWN.

Subscribed and sworn to before me this 15th day of December, 1897.

JAS. A. WINSTON, *Clerk.*

Which said motion for a continuance was by the court, after due consideration, overruled; to the overruling of said motion the defendant then and there excepted.

30 That thereafter, on the 16th day of December, 1897, on the trial of this cause in the said court, at the said term, a jury was impaneled to try the issues in said cause, which jury was composed of the following-named persons, to wit:

1. Lewis Lyons.
2. J. W. Thompson.
3. Joseph Downing.
4. R. M. Bean.
5. J. W. Graham.
6. David Berryhill.
7. F. A. Mannering.
8. F. P. Wills.
9. W. J. McMakin, sr.
10. Charles Winfield.
11. Lewis Miller.
12. Ferdinand Farmer.

That thereupon the Government introduced evidence before the jury tending to prove the defendant guilty of the crime charged in the indictment, and, the case for the Government being closed, the defendant introduced evidence tending to establish his innocence.

After all the evidence, both for the prosecution and the defense, had been heard by the jury, the court charged the jury as follows:

31 Gentlemen of the jury, you will give attention to the charge of the court as to the law governing this case.

The defendant in this case stands charged by the indictment with the crime of murder.

Murder is defined by the law to be the unlawful and felonious killing of a human being, in the peace of the United States, with malice aforethought, either expressed or implied.

Express malice is that deliberate intention of the mind unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

Malice shall be implied when no considerable provocation appears, or where the killing manifests a wicked disposition.

The killing being proved, the burden of proving circumstances that justify or excuse the homicide devolves on the accused, unless by the proof on the part of the prosecution it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide.

Murder may proven either by the evidence of witnesses who were present and witnessed the killing, or by circumstantial evidence; that is, by circumstances which, when taken together, form a perfect chain of evidence, and show beyond a reasonable doubt that the defendant, unlawfully and feloniously, and of his malice aforethought, took away the life of a person in the peace of the United States.

The burden of proving each and all of the material allegations in the indictment, beyond a reasonable doubt, rests upon the prosecution.

If you believe from the evidence, beyond a reasonable doubt, that the defendant, Cyrus A. Brown, within the northern district of the Indian Territory, unlawfully, wilfully, feloniously, and of his malice
32 aforethought killed Daniel Cutbert, as charged in the indictment, and that all the other material allegations in the indictment have been proven beyond a reasonable doubt, your verdict should be guilty.

The charity of the law and its solicitude for the safety of the innocent are such that a person accused of crime is presumed to be innocent until the contrary is shown by the evidence beyond a reasonable doubt, and this presumption of innocence is a proper element of defense in behalf of the defendant. The strength of the presumption of innocence is not overcome by mere preponderance of evidence, nor by any weight of preponderant evidence, but it stands as a shield of the accused until it is overthrown by evidence that satisfies your minds beyond a reasonable doubt that the defendant is guilty of the crime as charged in the indictment.

What is meant by circumstantial evidence in criminal cases is proof of such facts or circumstances surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged. As a matter of law, where a conviction for a criminal offense is sought upon circumstantial evidence alone the Government must not only show by a preponderance of evidence that the facts and circumstances are true, but they must be such facts and circumstances as are incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of any reasonable hypothesis other than the guilt of the accused. If the jury finds from the evidence that all the criminating circumstances of the case will as well apply to another person as to the defendant, or if, taken all together, they do not satisfy your minds beyond a reasonable doubt of the defendant's guilt, then you should acquit.

In all criminal cases, where the prosecution depends upon cir-
33 cumstantial evidence alone for conviction, and such evidence is not conclusive in its character, previous good character of the accused, if proven, may be considered by you in determining the question of his guilt or innocence.

Though the jury may believe from the evidence that the said Daniel Cutbert was murdered at the time and place charged in the indictment, and that the defendant Cyrus A. Brown was present at the time of such murder, still, if the jury is not satisfied beyo'd a reasonable doubt that the said Cyrus A. Brown murdered him, or was previously aware of the purpose of some other person to kill the said Cutbert, and that he in some way aided, abetted, or assisted in the killing, or advised and encouraged it, then you should find the said Cyrus A. Brown not guilty.

The jury has no right to disregard the testimony of the defendant on the ground alone that he is the defendant and stands charged with the commission of a crime. The law presumes the defendant to be innocent until he is proven guilty, and the jury should consider his testimony together with all the other circumstances of the case, and if from all the evidence the jury has any reasonable doubt as to the guilt of the defendant, you should give him the benefit of such doubt and acquit him; but in considering the testimony of the defendant you should take into consideration the fact that he is the defendant in the case, his great interest in the case, and the result of the trial, his appearance and manner of testifying while on the stand, whether or not he has made other and contradictory statements regarding the facts of the case (if the evidence shows that he has made other and contradictory statements), and taking all these circumstances into consideration, you should give to his testimony such weight and only such weight as you think it entitled to under all the circumstances of the case.

34 If the evidence fai;s to show any reasonable or sufficient motive for the commission of the crime charged upon the part of the accused that is a circumstance in favor of his innocence; and if the evidence fails to show any reasonable motive on the part of the accused to commit the crime charged against him that is a circumstance that the jury should consider, in connection with all the other evidence in the case, in making up your verdict.

Although the jury may believe that the deceased was killed in the manner charged in the indictment, but that the shot was fired by Johnson Morgan or Cyrus A. Brown, still, if the jury is not able to find from the evidence who fired the shot that killed the deceased, then you should consider it the same as if it had been proven that some person other than the defendant had fired the fatal shot.

If the jury should find from a consideration of the evidence that it points as strongly to Johnson L. Morgan as the person who committed the crime as it does to the defendant, or if the jury entertains a reasonable doubt as to whether the said Johnson L. Morgan or the defendant is the guilty party, then the jury should acquit.

The indictment is not to be taken as evidence. As the court has told you, the defendant is presumed to be innocent, and that presumption follows him through the case until it is either crystal'ized into a fact or overturned by such evidence as convinces your minds beyond a reasonable doubt that the defendant is guilty as charged. Although you may believe the defendant guilty, or most probably guilty, or have a strong suspicion of his guilt, you are not authorized under the law to convict unless all the circumstances in evidence before you convince your minds

beyond a reasonable doubt of the defendant's guilt. If there is such
35 conflict of testimony or lack of testimony as raises a doubt as to the defendant's guilt then it is your duty to resolve that doubt in favor of the defendant and acquit him. Still, the jury is not authorized to go in search of doubts, or to depend upon chimerical doubts which might arise in the mind of a man, but it must be based upon the evidence or a lack of evidence to make a reasonable doubt. A reasonable doubt is one growing out of the unsatisfactory or contradictory nature of the testimony, and is such that, after a consideration of all the facts in evidence before you, would cause an ordinarily prudent man, in considering the graver affairs of life, to hesitate and say, "I am not satisfied," and, as applied to this case, a reasonable doubt must be one growing out of the unsatisfactory or contradictory nature of the testimony, which, after consideration of all the testimony in the case, causes you to hesitate and say, "I am not satisfied of the guilt of the prisoner."

If you believe from the evidence that the defendant killed and murdered Daniel Cuthert, as charged in the indictment, then it is not material whether he was shot with a gun or a pistol, and in this case, there being two counts in the indictment, you may find him guilty under either the one or the other. Of course, you can not find him guilty on both counts, as there is but one crime charged.

You are the judges of the weight of the evidence and of the credibility of the witnesses, but in considering the testimony of the several witnesses it is your duty to take into consideration their appearance and manner while on the stand, their intelligence or lack of intelligence, their means of knowledge or lack of knowledge, as shown by their testimony, their interest or lack of interest, their feeling or prejudice—if any has been manifested—as to whether their story is reasonable or unreason-
36 able, as to whether they have made contradictory statements—if any such have been shown—and taking all these facts and circumstances into consideration you should give to the evidence of the respective witnesses such weight as you think it entitled to under all the circumstances of the case.

If you are satisfied that any witness has wilfully testified falsely with reference to any material matter, then and in that case, gentlemen, you are authorized to disregard the testimony of such witness in its entirety, unless the evidence of the witness has been corroborated by the unimpeached testimony of other credible witnesses, in which case you should give to his testimony such weight as you think it entitled to in connection with the corroborative evidence of the other witnesses.

In conclusion, the court instructs you that if, upon all the facts and circumstances proven in this case, you reach the conclusion that the defendant is guilty of the crime charged, it will be your duty to so find him, and if you find him guilty of murder you may qualify your verdict—if you conclude from all the circumstances of the case you should so decide—by adding thereto the words "without capital punishment." You must decide this case upon the law and the evidence before you, and you must decide this case fairly and impartially, without fear, favor, or affection. You must do your duty. If the defendant has not been proven guilty beyond a reasonable doubt, you should so find. If the defendant has been proven guilty beyond a reasonable doubt, as charged, you should so find.

If you believe from the evidence, beyond a reasonable doubt, that the defendant Brown was present at the time of the killing of Cutbert, and if you believe that he had previously thereto entered into a conspiracy with Johnson Morgan to kill and murder Cutbert and knew of the
37 commission of the crime, and neither raised his voice nor gave information of the fact, at the time nor after its commission, or if you believe from the evidence that he, being present, aided, abetted, or assisted in the killing of Cutbert, or, not being present, had advised and counseled the killing of Cutbert, then, and in that case, gentlemen of the jury—if these facts have been proven beyond a reasonable doubt—whether he fired the gun or some one else fired, he would be guilty. I say if he was there aiding, abetting, or assisting, or if he was there ready, in conformity with an agreement previously entered into, to assist in case it was found necessary, then and in that case you should find him guilty, whether he fired the shot or some one else fired it.

To the latter part of which charge the defendant then and there at the time excepted and still excepts.

38 The defendant also, when the evidence was closed, asked the court to direct a verdict of acquittal, which request was refused.

To which refusal of the court to so direct the jury defendant then and there at the time, and before the jury had retired from the bar of the court, excepted and still excepts.

That after argument by counsel, on the same day, viz, December 17th, 1897, the jury having retired to consider of their verdict, returned into court the following verdict:

"We, the jury, duly empaneled and sworn in the above-entitled cause, do find from the law and the evidence the said defendant, Cyrus A. Brown, guilty of murder, as charged in the first count of the within indictment."

JOHN W. GRAHAM,
Foreman.

To which verdict, and the form thereof, defendant then and there at the time excepted and still excepts.

39 That thereafter, on the 20th day of December, 1897, defendant his motion to set aside the verdict, and grant him a new trial, which motion is as follows, viz:

In the United States court for the northern district of the Indian Territory, sitting at Muscogee, December term, 1897.

UNITED STATES)
vs.) No. 3875. Murder.
CYRUS A. BROWN, DEFENDANT.)

Comes now the defendant, Cyrus A. Brown, in the above-entitled case, and states that his substantial rights have been prejudiced by the verdict rendered by the jury against him in said case, and moves the court to set aside the verdict and grant him a new trial in said case on the following grounds:

1st. Because the verdict is against the law.
2nd. Because the verdict is against the evidence.
3d. Because the verdict is against the law and the evidence.

4th. Because the court misinstructed the jury.

5th. Because the court refused to instruct the jury to return a verdict of acquittal.

6th. Because the defendant was previously tried before the jury upon the charge contained in the first count of the indictment at the May term of this court, and the jury in that case by their verdict, rendered on July 17th, 1897, impliedly acquitted the defendant of the crime charged in said first count, said case having been submitted to the jury on both the first and second counts.

That the verdict rendered on the previous trial was as follows:

"We, the jury, find the defendant, Cyrus A. Brown, guilty of murder, as charged in the second count of the within indictment.

J. W. NEWBERRY,
Foreman."

40 7th. Because the indictment in this case is an indictment for murder in the second degree, and it does not comform to and support the verdict rendered in the first degree.

8th. Because the court overruled defendant's motion for a postponement or continuance of the case on account of absent witnesses and evidence.

KOOGLER & WATKINS,
Attorneys for Defense.

Which motion, on the 24th day of December, 1897, after argument by counsel, was overruled by the court, to which ruling of the court defendant at the time then and there excepted and still excepts.

41 That thereupon, on the same day, viz, the 24th day of December, 1897, defendant filed his motion in arrest of judgment, which is as follows:

In the United States court for the northern district of the Indian Territory.

UNITED STATES
vs. } No. 3875.
CYRUS A. BROWN, DEFENDANT.

Comes now the defendant, Cyrus A. Brown, in the above-entitled action, and moves the court to arrest the judgement and sentence upon the verdict rendered in the case, because the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court, and the indictment is for murder in the second degree, and is informal and insufficient.

Because the verdict does not conform to the indictment and is for an offense greater than charged.

Because the defendant could not legally be put upon trial on the first count of the indictment herein, as the defendant was tried upon said first count at the May term of this court, and to which offense as charged in said first count defendant plead not guilty, and the jury in said case,

having been duly empaneled and sworn to try the issues in that count, and after hearing the evidence adduced before them, and the case having been submitted to them by the court upon the first count of the indictment herein as well as upon second count of said indictment, they, by their verdict rendered in said trial, impliedly acquitted the defendant of the offense charged in said first count, and since said first trial defendant has never been arraigned or given opportunity to plead to said
42 first count, and defendant could not legally be again put in jeopardy of his life upon the offense charged in said first count.

KOOGLER & WATKINS,
Attorneys for Defendant, Cyrus A. Brown.

Which said motion in arrest of judgement was overruled by the court, to which ruling of the court defendant at the time then and there excepted and still excepts.

43 Whereupon the court rendered judgment on the verdict, and sentenced the defendant to death, as set forth in the record; to which action of the court in rendering such judgment and sentence on the verdict returned into court, defendant then and there excepted, and still excepts.

Whereupon, on the same day, the defendant was granted, by an entry made of record, sixty days in which to prepare and file his bill of exceptions.

And now, on this 20th day of January, A. D. 1898, within the time allowed by the order of the court, comes the defendant and presents to the Hon. John R. Thomas, judge of the United States courts of the Indian Territory, assigned to the northern district, before whom the foregoing proceedings were had, his bill of exceptions, and prays that it be allowed, signed, sealed, filed, and made a part of the record in the case; and it is accordingly done.

Given under my hand and seal as judge on the 20th day of January, A. D. 1898.

JOHN R. THOMAS,
Judge of the United States Courts of the Indian Territory.

(Endorsed as follows:) No. 3875; in the United States court, northern district; United States vs. Cyrus A. Brown; bill of exceptions; filed January 20th, 1898; Jas. A. Winston, clerk.

44 Thereafterwards, on the 1st day of February, A. D. 1898, the same being one of the regular days of the said December, 1897, term of said court, present, Hon. Wm. M. Springer, judge, among the proceedings had was the following, to wit:

THE UNITED STATES *vs.* — No. 3875. Indictment for murder.

On this day comes the defendant by his counsel, and files his petition for writ of error to the Supreme Court of the United States, and prayer for reversal of judgment, and also files his assignment of errors; which

writ of error, prayer for reversal of judgment, and assignment of errors are as follows, to wit:

In the Supreme Court of the United States of America.

CYRUS A. BROWN, APPELLANT,
vs.
UNITED STATES OF AMERICA, APPELLEE.

To the honorable Supreme Court of the United States of America:

Your petitioner, Cyrus A. Brown, appellant in the above-entitled case, herewith files this his petition, and prays that a writ of error may be granted him by the Supreme Court of the United States from the judgment and sentence rendered against him by the United States court for the northern district of the Indian Territory, and for grounds of his petition states:

That at the December term, 1897, of the United States court for the northern district of the Indian Territory, sitting at Muscogee, Hon. John R. Thomas, presiding judge, he was tried upon and indictment for the murder of Daniel Cutbert, and was convicted of said crime on the first count of said indictment, and on the 24th day of December, 1897, judgment was rendered against him, and he was sentenced to death by said court, and to be hung by the neck on the 25th day of February, 1898.

He further says that in the record and proceedings, as also in the rendition of the judgment and sentence against him by the said court, in said cause, manifest error hath happened to the great damage of this petitioner, and which error he specifies more particularly as follows:

Specifications of error.

First. Because the verdict returned by the jury is against and contrary to the law.

Second. Because the verdict of the jury is against and contrary to the evidence.

Third. Because the verdict of the jury is against and contrary to the law and the evidence.

Fourth. The court erred in putting the defendant on trial for his life upon the indictment in this case, as the said indictment was an indictment for murder in the second degree under the laws applicable to this case, as adopted from Mansfield's Digest of the Statutes of Arkansas, and the procedure thereunder.

Fifth. As the defendant was charged in the indictment as principal, and not accessory before the fact, the court erred in giving the following instruction to the jury:

"If you believe from the evidence, beyond a reasonable doubt, that the defendant Brown was present at the time of the killing of Cutbert, and if you believe that he had previously thereto entered into a conspiracy with Johnson Morgan to kill and murder Cutbert, and knew of the commission of the crime, and neither raised his voice, nor gave information of the fact, at the time, nor after its commission, or if you believe from the evidence that he being present, aided, abetted, or assisted in the killing of Cutbert, or not being present, had advised and counselled the killing of Cutbert, then, and in that case, gentlemen of the jury—if these

facts have been proven beyond a reasonable doubt—whether he
46 fired the gun or some one else fired it, he would be guilty. I say if he was there aiding, abetting, or assisting, or if he was there ready, in conformity with an agreement previously entered into, to assist in case it was found necessary, then and in that case you should find him guilty, whether he fired the shot or some one else fired it."

Sixth. The court erred in submitting the case to the jury on both counts of the indictment; and erred in refusing to instruct the jury to return a verdict of acquittal, particularly as to the first count of the indictment, because the defendant had previously been tried on both counts of the indictment, and was impliedly acquitted on the first count thereof.

Seventh. The court erred in not instructing the jury as to the degree of murder, as defined by the laws applicable to this case; and the verdict of the jury was incomplete in not specifying whether the jury found the defendant guilty of murder in the first or second degree.

Eighth. The court erred in rendering judgment and sentence on the verdict, as returned by the jury, because the verdict does not find whether the defendant is guilty of murder in the first or second degree.

Ninth. The court erred in sentencing the defendant to death upon the charge contained in the indictment in this case; said indictment being only for murder in the second degree.

Tenth. The court erred in overruling defendant's motion for continuance.

Eleventh. The court erred in not sustaining defendant's motion for a new trial.

Twelfth. The court erred in not sustaining defendant's motion in arrest of judgment.

47 Wherefore, appellant prays that he be granted a writ of error by the Supreme Court of the United States, directed to the aforesa'd United States court for the northern district of the Indian Territory, sitting in Muscogee, requiring it to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States; and said appellant, Cyrus A. Brown, also prays that the error above specified may be corrected, and the judgment and sentence, above *mentioned*, pronounced against him may be reversed and what of right, according to the laws and customs of the United States, should be done.

Petitioner also asks that a citation be issued to said appellee, the United States of America, and to the Hon. Pliny L. Soper, United States attorney for the northern district of the Indian Territory, to appear at the term of the Supreme Court of the United States, to be held at Washington, D. C., sixty days after date, to show cause why the error above mentioned should not be corrected.

JOHN H. KOOGLER.
JOHN WATKINS.
KOOGLER & WATKINS,
Attorneys for Appellant, Cyrus A. Brown.

Endorsed as follows:

United States Supreme Court. Cyrus A. Brown, appellant, versus The United States, appellee. Petition for writ of error and prayer for reversal of judgment. Filed in open court Feb. 1, 1898. Jas. A. Winston, clerk.

48 *Assignment of errors.*

In the Supreme Court of the United States of America.

CYRUS A. BROWN, APPELLANT,
vs.
UNITED STATES OF AMERICA, APPELLEE.

Appealed for the northern district of the Indian Territory.

Specifications of error.

Cyrus A. Brown, the appellant in the above case, respectfully shows to the court that in the record and proceedings in this case there is manifest error in this:

First. Because the verdict returned by the jury is against and contrary to the law.

Second. Because the verdict of the jury is against and contrary to the evidence.

Third. Because the verdict of the jury is against and contrary to the law and the evidence.

Fourth. The court erred in putting the defendant on trial for his life upon the indictment in this case, as the said indictment was an indictment for murder in the second degree under the laws applicable to this case, as adopted from Mansfield's Digest of the Statutes of Arkansas, and the procedure thereunder.

Fifth. As the defendant was charged in the indictment as principal and not accessory before the fact, the court erred in giving the following instruction to the jury:

"If you believe from the evidence, beyond a reasonable doubt, that the defendant, Brown, was present at the time of the killing of Cutbert, and if you believe that he had previously thereto entered into a conspiracy with Johnson Morgan to kill and murder Cutbert, and knew of the commission of the crime, and neither raised his voice nor gave information of the fact, at the time nor after its commission, or if you believe from the evidence that he, being present, aided, abetted, or assisted in the killing of Cutbert, or, not being present, had advised and counseled the killing of Cutbert, then, and in that case, gentle-
49 men of the jury, if these facts have been proven beyond a reasonable doubt, whether he fired the gun or some one else fired it, he would be guilty. I say if he was there aiding, abetting, or assisting, or if he was there ready, in conformity with an agreement previously entered into, to assist in case it was found necessary, then and in that case you should find him guilty, whether he fired the shot or some one else fired it."

Sixth. The court erred in submitting the case to the jury on both counts of the indictment, and erred in refusing to instruct the jury to return a verdict of acquittal, particularly as to the first count of the indictment, because the defendant had previously been tried on both counts of the indictment, and was impliedly acquitted on the first count thereof.

Seventh. The court erred in not instructing the jury as to the degree of murder as defined by the law applicable to this case, and the verdict of the jury was incomplete in not specifying whether the jury found the defendant guilty of murder in the first or second degree.

Eighth. The court erred in rendering judgment and sentence on the verdict as returned by the jury, because the verdict does not find whether the defendant was guilty of murder in the first or second degree.

Ninth. The court erred in sentencing the defendant to death upon the charge contained in the indictment in this case; said indictment being only for murder in the second degree.

Tenth. The court erred in overruling defendant's motion for continuance.

Eleventh. The court erred in not sustaining defendant's motion for a new trial.

Twelfth. The court erred in not sustaining defendant's motion in arrest of judgment.

Wherefore, defendant prays that said error may be corrected and
56 what of right and according to the law and customs of the United States should be done and that the judgment and sentence rendered against him be reversed and the case remanded.

JOHN H. KOOGLER,
JOHN WATKINS,
Attorneys for Appellant, Cyrus A. Brown.

Endorsed as follows:

United States Supreme Court. Cyrus A. Brown, appellant, versus The United States, appellee. Assignment of errors. Filed in open court Feb. 1, 1898. Jas. A. Winston, clerk.

51 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States court in the Indian Territory, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States court before you, or some of you, between The United States, plaintiff, and Cyrus A. Brown, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

[SEAL.] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

52 On this sixteenth day of February, in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared John R. Thomas before me, the subscriber, James A. Winston, clerk of the United States court in and for the northern district of the Indian Territory, and makes oath that he received a true copy of the within writ of error to the United States court in the Indian Territory, and that he is the identical John R. Thomas, judge of the United States courts in the Indian Territory, before whom the case of The United States vs. Cyrus A. Brown was tried and the defendant convicted of the crime of murder.

JOHN R. THOMAS,
Judge U. S. Courts, Indian Territory.

Sworn to and subscribed the 16th day of February, A. D. 1898.

[SEAL.] JAS. A. WINSTON,
Clerk U. S. Court in the Northern Dist., Ind. Ter.
By J. C. ANDERSON,
Deputy Clerk.

I hereby acknowledge service of a copy of the within writ this 16th day of Feb'y, 1898.

P. L. SOPER,
U. S. Attorney, Northern District of Ind. Ter.

53 UNITED STATES OF AMERICA, *ss:*

To the United States, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States court in the Indian Territory, wherein Cyrus A. Brown is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 8th day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

54 On this sixteenth day of February, in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared John R. Thomas before me, the subscriber, James A. Winston, clerk of

the United States court in and for the northern dist. of the Indian Territory, and makes oath that he received a true copy of the within citation to the United States court in the Indian Territory, and that he is the identical John R. Thomas, judge of the U. S. courts in the Indian Territory before whom the case of The United States vs. Cyrus A. Brown was tried and the defendant convicted of the crime of murder.

Sworn to and subscribed the 16th day of February, A. D. 1897.

JOHN R. THOMAS,
Judge U. S. Courts in the Ind'n Ter.

[SEAL.] JAS. A. WINSTON, *Clerk*,
By J. C. ANDERSON, *D. C.*

I hereby acknowledge service of a copy of the within writ this 16th day of Feb'y, 1898.

P. L. SOPER,
United States Attorney, Northern District of Indian Territory.

55 UNITED STATES OF AMERICA,
Indian Territory, Northern District, ss:

I, James A. Winston, clerk of the United States court for the northern district of the Indian Territory, do hereby certify that the within and foregoing transcript is a full, true, and correct transcript of the record and proceedings, and all things as far as called for concerning the criminal cause numbered 3875, and entitled The United States, plaintiff, and Cyrus A. Brown, defendant, as the same appears from the records and files at my office at Muskogee, Indian Territory.

Witness my hand and the seal of said court on this the 16th day of February, A. D. 1898.

[SEAL.] JAMES A. WINSTON, *Clerk*,
By N. S. YOUNG, *Deputy Clerk.*

56 In the Supreme Court of the United States of America.

CYRUS A. BROWN, APPELLANT,)
vs.
UNITED STATES OF AMERICA, APPELLEE.)

To the honorable Supreme Court of the United States of America:

Your petitioner, Cyrus A. Brown, appellant in the above-entitled case, herewith files this his petition, and prays that a writ of error may be granted him by the Supreme Court of the United States from the judgment and sentence rendered against him by the United States court for the northern district of the Indian Territory, and for grounds of his petition states:

That at the December term, 1897, of the United States court for the northern district of the Indian Territory, sitting at Muscogee, Hon. John R. Thomas presiding judge, he was tried upon an indictment for the murder of Daniel Cutbert, and was convicted of said crime on the first count of said indictment, and on the 24th day of December, 1897, judgment was rendered against him and he was sentenced to death by said court and to be hung by the neck on the 25th day of February, 1898.

He further says that in the record and proceedings, as also in the rendition of the judgment and sentence against him by the said court in said cause, manifest error hath happened to the great damage of this petitioner, and which error he specifies more particularly, as follows:

Specifications of error.

First. Because the verdict returned by the jury is against and contrary to the law.

Second. Because the verdict of the jury is against and contrary to the evidence.

Third. Because the verdict of the jury is against and contrary to the law and the evidence.

Fourth. The court erred in putting the defendant on trial for
57 his life upon the indictment in this case, as the said indictment was an indictment for murder in the second degree under the laws applicable to this case, as adopted from Mansfield's Digest of the Statutes of Arkansas, and the procedure thereunder.

Fifth. As the defendant was charged in the indictment as principal, and not accessory before the fact, the court erred in giving the following instruction to the jury:

"If you believe from the evidence, beyond a reasonable doubt, that the defendant, Brown, was present at the time of the killing of Cutbert, and if you believe that he had previously thereto entered into a conspiracy with Johnson Morgan to kill and murder Cutbert, and knew of the commission of the crime, and neither raised his voice nor gave information of the fact, at the time nor after its commission, or if you believe from the evidence that he being present aided, abetted, or assisted in the killing of Cutbert, or not being present had advised and counselled the killing of Cutbert, then, and in that case, gentlemen of the jury—if these facts have been proven beyond a reasonable doubt—whether he fired the gun or some one else fired it, he would be guilty. I say if he was there aiding, abetting, or assisting, or if he was there ready, in conformity with an agreement previously entered into, to assist in case it was found necessary, then and in that case you should find him guilty, whether he fired the shot or some one else fired it."

Sixth. The court erred in submitting the case to the jury on both counts of the indictment; and erred in refusing to instruct the jury to return a verdict of acquittal, particularly as to the first count of the indictment, because the defendant had previously been tried on both counts of the indictment, and was impliedly acquitted on the first count thereof.

Seventh. The court erred in not instructing the jury as to the degree of murder, as defined by the laws applicable to this case; and the verdict of the jury was incomplete in not specifying whether the jury found the defendant guilty of murder in the first or second degree.

Eighth. The court erred in rendering judgment and sentence on the verdict as returned by the jury, because the verdict does not find whether the defendant is guilty of murder in the first or second degree.

58 Ninth. The court erred in sentencing the defendant to death upon the charge contained in the indictment in this case, said indictment being only for murder in the second degree.

Tenth. The court erred in overruling defendant's motion for continuance.

Eleventh. The court erred in not sustaining defendant's motion for a new trial.

Twelfth. The court erred in not sustaining defendant's motion in arrest of judgment.

Wherefore appellant prays that he be granted a writ of error by the Supreme Court of the United States, directed to the aforesaid United States court for the northern district of the Indian Territory, sitting at Muscogee, requiring it to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States; and said appellant, Cyrus A. Brown, also prays that the error above specified may be corrected and the judgment and sentence above mentioned pronounced against him may be reversed, and what of right, according to the laws and customs of the United States, should be done.

Petitioner also asks that a citation be issued to said appellee, The United States of America, and to Hon. Pliny L. Soper, United States attorney for the northern district of the Indian Territory, to appear at the term of the Supreme Court of the United States, to be held at Washington, D. C., sixty days after date to show cause why the error above mentioned should not be corrected.

JOHN H. KOOGLER.
JOHN WATKINS.
KUGLER & WATKINS,
Attorneys for Appellant, Cyrus A. Brown.

59 (Indorsed on back:) Case No. 16808. Supreme Court U. S. October term, 1897. Term No., 595. Cyrus A. Brown, P. E., *vs.* The United States. Petition for writ of error & prayer for reversal. Office Supreme Court U. S. Filed Feb. 23, 1898. James H. McKenney, clerk.

60 In the Supreme Court of the United States of America.

CYRUS A. BROWN, APPELLANT,
vs.
UNITED STATES OF AMERICA, APPELLEE.

Appealed for the northern district of the Indian Territory.

Specifications of error.

Cyrus A. Brown, the appellant in the above case, respectfully shows to the court that in the record and proceedings in this case there is manifest error in this:

First. Because the verdict returned by the jury is against and contrary to the law.

Second. Because the verdict of the jury is against and contrary to the evidence.

Third. Because the verdict of the jury is against and contrary to the law and the evidence.

Fourth. The court erred in putting the defendant on trial for his life upon the indictment in this case, as the said indictment was an indictment

for murder in the second degree under the laws applicable to this case, as adopted from Mansfield's Digest of the Statutes of Arkansas, and the procedure thereunder.

Fifth. As the defendant was charged in the indictment as principal and not accessory before the fact, the court erred in giving the following instructions to the jury:

"If you believe from the evidence, beyond a reasonable doubt, that the defendant, Brown, was present at the time of the killing of Cutbert, and if you believe that he had previously thereto entered into a conspiracy with Johnson Morgan to kill and murder Cutbert, and knew of the commission of the crime, and neither raised his voice nor gave information of the fact at the time nor after its commission; or if you believe from the evidence that he, being present, aided, abetted, or assisted in the killing of Cutbert, or, not being present, had advised and counseled the killing of Cutbert, then, and in that case, gentlemen of the jury, if these facts have been proven beyond a reasonable doubt, whether he fired the
61 gun or someone else fired it, then he would be guilty. I say, if he was there aiding, abetting, or assisting, or if he was there ready, in conformity with an agreement previously entered into, to assist in case it was found necessary, then, and in that case, you should find him guilty, whether he fired the shot or someone else fired it."

Sixth. The court erred in submitting the case to the jury on both counts of the indictment; and erred in refusing to instruct the jury to return a verdict of acquittal, particularly as to the first count of the indictment, because the defendant had previously been tried on both counts of the indictment, and was impliedly acquitted on the first count thereof.

Seventh. The court erred in not instructing the jury as to the degree of murder, as defined by the laws applicable to this case; and the verdict of the jury was incomplete in not specifying whether the jury found the defendant guilty of murder in the first or second degree.

Eighth. The court erred in rendering judgment and sentence on the verdict, as returned by the jury, because the verdict does not find whether the defendant was guilty of murder in the first or second degree.

Ninth. The court erred in sentencing the defendant to death upon the charge contained in the indictment in this case; said indictment being only for murder in the second degree.

Tenth. The court erred in overruling defendant's motion for continuance.

Eleventh. The court erred in not sustaining defendant's motion for a new trial.

Twelfth. The court erred in not sustaining defendant's motion in arrest of judgment.

Wherefore defendant prays that said error may be corrected and what of right and according to the laws and customs of the United States should be done; and the judgmeat and sentence rendered against him be reversed and the case remanded.

JOHN H. KOOGLER, and
JOHN WATKINS,
Attorneys for Appellant, Cyrus A. Brown.

62 (Indorsed on back:) Case No. 16808. Supreme Court U. S., October term, 1897. Term No., 595. Cyrus A. Brown, P. E., *vs.* The United States. Assignment of errors. Office Supreme Court U. S. Filed Feb. 23, 1898. James H. McKenney, clerk.

(Indorsement on cover:) Case No. 16808. Term No., 595. Cyrus A. Brown, plaintiff in error, *vs.* The United States. Indian Territory, U. S. court. Filed February 23d, 1898.

No. 595. 249.
Brief for P. E. (on mo.)

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

CYRUS A. BROWN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES, DEFENDANT IN error.
} No. 595.

BRIEF OF ARGUMENT IN OPPOSITION TO MOTION TO DISMISS FOR WANT OF JURISDICTION.

JOHN H. KOOGLER,
JOHN WATKINS,
Counsel for Plaintiff in Error.

(Not filed as K. & W. were not members of Sup. Ct. Bar — Ct. considered by Court.)

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

CYRUS A. BROWN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES, DEFENDANT IN ERROR. } No. 595.

BRIEF OF ARGUMENT IN OPPOSITION TO MOTION TO DISMISS FOR WANT OF JURISDICTION.

The statutes of the United States bearing upon the question of writs of error and appeals to the Supreme Court of the United States in criminal cases are briefly as follows:

On February 6, 1898, Congress passed a law providing for a review by writ of error by the Supreme Court of the final judgment of any court of the United States.

Supplement to United States Revised Statutes, second edition, page 639, section 6:

> SEC. 6. That hereafter in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be reexamined, reversed, or affirmed by

the Supreme Court of the United States, upon a writ of error, under such rules and regulations as said court may prescribe.

Every such writ of error shall be allowed as of right, and without the requirement of any security for the prosecution of the same or for costs. Upon the allowance of every such writ of error it shall be the duty of the clerk of the court to which the writ of error is directed to forthwith transmit to the clerk of the Supreme Court of the United States a certified transcript of the record in such case, and it shall be the duty of the clerk of the Supreme Court of the United States to receive, file, and docket the same.

By the act of May 2, 1890, in reference to the courts in the Indian Territory, provision was made for appeals and writs of error from the United States courts in the Indian Territory to the Supreme Court of the United States.

Supplement to United States Revised Statutes, second edition, page 738, section 42:

SEC. 42. That appeals and writs of error may be taken and prosecuted from the decision of the United States court in the Indian Territory to the Supreme Court of the United States, in the same manner and under the same regulations as from the circuit courts of the United States, except as otherwise provided in this act.

In the act of March 3, 1891, establishing United States circuit courts of appeals, it is further provided:

Supplement to United States Revised Statutes, second edition, p. 903, section 5:

SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing

circuit courts direct to the Supreme Court in the following cases:

In cases of conviction of a capital or otherwise infamous crime.

Section 13 of said act is as follows:

SEC. 13. Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States under this act.

The act of Congress of March 1, 1895, adopted as a part of the criminal law of the Indian Territory chapter 45 of Mansfield's Digest of the Laws of Arkansas (Criminal Law), with certain provisos, and chapter 46 of the same Digest (Criminal Procedure). It also provided for a court of appeals in the Indian Territory.

Supplement to Revised Statutes, volume 2, Nos. 1–5, pages 392–398.

SEC. 11. That the judges of said court shall constitute a court of appeals, to be presided over by the judge oldest in commission as chief justice of said court; and said court shall have such jurisdiction and powers in said Indian Territory, and such general superintending control over the courts thereof as is conferred upon the supreme courts of Arkansas over the courts thereof by the laws of said State, as provided by chapter forty of Mansfield's Digest of the Laws of Arkansas; and the provisions of said chapter, so far as they relate to the jurisdiction and powers of said supreme court of Arkansas as to appeals and writs of error, and as to the trial and de-

cision of causes, so far as they are applicable shall be, and they are hereby, extended over and put in force in the Indian Territory; and appeals and writs of error from said courts in said districts to said appellate court in criminal cases shall be prosecuted under the provisions in chapter forty-six of said Mansfield's Digest, by this act put in force in the Indian Territory. But no one of said judges shall sit in said appellate court in the determination of any cause in which an appeal is prosecuted from the decision of any court over which he presided. In case of said presiding judge being absent, the judge next oldest in commission shall preside over said appellate court, and in such case two of said judges shall constitute a quorum.

In all cases where the court is equally divided in opinion the judgment of the court below shall stand affirmed.

Writs of error and appeals from the final decisions of said appellate court shall be allowed, and may be taken to the circuit court of appeals for the eighth judicial circuit in the same manner, and under the same regulations, as appeals are taken from the circuit courts of the United States.

* * * * *

SEC. 13. That none of the provisions of any other acts, or of any of the laws of the United States, or of the State of Arkansas, heretofore put in force in said Indian Territory, except so far as they come in conflict with the provisions of this act, are intended to be repealed, or in any manner affected by this act, but all such acts and laws are to remain in full force and effect in said Territory.

The act of January 25, 1897, withdrew from the Supreme Court jurisdiction of criminal cases not capital.

Volume 29, Statutes at Large, page 492:

> CHAP. 68. That so much of section five of the act entitled "An act to establish a circuit court of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March third, eighteen hundred and ninety one, as reads, "in cases of a conviction of a capital or otherwise infamous crime," be amended by striking out the words "or otherwise infamous," so that the same will read, "in cases of conviction of a capital crime," and that appeals or writs of error may be taken from the district courts or circuit courts to the proper circuit court of appeals in cases of conviction of an infamous crime, not capital: *Provided*, That no case now pending in the Supreme Court or in which an appeal or writ of error shall have been taken or sued out before the passage of this act shall be hereby affected, but in all such cases the jurisdiction of the Supreme Court shall remain, and said Supreme Court shall proceed therein as if this act had not been passed.
>
> Approved, January 20, 1897.

ARGUMENT.

The United States attorney contends that the United States court for the northern district and the United States court of appeals in the Indian Territory are not circuit or district courts. They may not be such courts, in terms, and we do not claim that the several United States courts in the Indian Territory are circuit and district courts properly; but they are United States courts, and punish violations of the general laws of Congress occurring within the Indian Territory, as well as the

violation of the special laws enacted for the Territory. They are United States courts created by Congress, to enforce all laws of the United States, general or special, within the Indian Territory.

This is not an organized Territory, with a local government and a local legislature chosen by the people to make the laws for it. Congress gave us the government and laws and provides the courts to administer these laws. These courts are therefore as much United States courts as the circuit or district courts, with even a more extended jurisdiction within the limits of the Territory. They are a part of the judicial system of the United States, charged with the administration of the laws within the Territory, and are under the supervision and control of the Supreme Court of the United States as completely as any courts can be which are created by act of Congress.

The act of February 6, 1889, heretofore cited, provides for the review by writ of error of the final judgment of any court of the United States in capital cases. It also provides that such writ of error shall be allowed as a matter of right, and prescribes the duties of the clerk of the court where the case is tried, and the duties of the clerk of the Supreme Court, and the manner of suing out the writ of error, and limits the time.

This statute is perhaps declaratory of the right which a person accused of a capital offense against the laws of the United States at all times had, that of having his case reviewed by the highest tribunal of the land on a proper case made and presented.

JURISDICTION AS TO CRIMES.

The original act creating United States courts in the Indian Territory gave them a limited jurisdiction.

Supplement United States Revised Statutes, second edition, page 671:

> SEC. 5. That the court hereby established shall have exclusive original jurisdiction over all offenses against the laws of the United States committed within the Indian Territory as in this act defined, not punishable by death or by imprisonment at hard labor.

Under these statutes jurisdiction as to crimes punishable with death or imprisonment at hard labor was retained by the United States district courts at Fort Smith, Ark., and Paris, Tex.

By the act of May 2, 1890, the criminal jurisdiction of the courts in the Indian Territory was somewhat enlarged.

Supplement United States Revised Statutes, second edition, pages 731–738:

> SEC. 33. That the provisions of chapter forty-five of the said general laws of Arkansas, entitled "Criminal law," except as to the crimes and misdemeanor mentioned in the provisos to this section, and the provisions of chapter forty-six of said general laws of Arkansas, entitled "Criminal Procedure," as far as they are applicable, are hereby extended over and put in force in the Indian Territory, and jurisdiction to enforce said provisions is hereby conferred upon the United States court therein:
>
> *Provided*, That in all cases where the laws of the United States and the said criminal laws of Arkansas have provided for the punishment of the same

offenses the laws of the United States shall govern as to such offenses.

Jurisdiction of the higher felonies was still retained by the courts at Fort Smith and Paris.

By the act of March 1, 1895, full, original, and exclusive jurisdiction of all offenses against the laws of the United States was conferred upon the courts in the Indian Territory. (28 Stat. L., page 698, section 9).

This act also readopts chapters 45 and 46, contained in Mansfield's Digest of the Laws of Arkansas.

> SEC. 4. * * * The provisions of chapter forty-five of Mansfield's Digest of the General Laws of Arkansas, entitled "Criminal law," except as to the crimes and misdemeanors mentioned in the proviso of this section, and chapter forty-six of said laws of Arkansas, contained in said digest, entitled "Criminal procedure," and chapter ninety-one of said general laws, regulating the jurisdiction and procedure before justices of the peace in civil cases, be, and they are hereby, extended to and put in force in the Indian Territory; and the jurisdiction to enforce said provisions is hereby conferred upon the United States court in the Indian Territory: *Provided*, That in all cases where the laws of the United States and the said criminal laws of Arkansas have provided for the punishment of the same offenses, the laws of the United States shall govern as to said offenses, except for the crime of larceny, the punishment for which shall be that prescribed by the laws of the State of Arkansas, any law in force in said Indian Territory to the contrary notwithstanding.

The act of February 6, 1889, clearly gave to the Supreme Court this right of review. The United States

attorney contends, however, that this law is modified and repealed by the act of March 3, 1891. It was modified by the latter act, but in no sense repealed as to the jurisdiction of capital cases. This court has decided that the latter act places the court in the Indian Territory on the same footing with regard to writs of error and appeals to the Supreme Court as that occupied by the circuit and district courts of the United States.

McLish v. *Roff*, 141 U. S., 664.
In re Clausen, 140 U. S., 200.

But the United States attorney also contends that the act of March 1, 1895, repeals section 13, giving the right of appeal from the Indian Territory courts, by establishing another appellate tribunal in the Indian Territory for that purpose.

There are no words of repeal in the last-named statute. On the contrary, in section 13 of that act it is especially provided that none of the provisions of any other act or of any of the laws of the United States or of the State of Arkansas heretofore put in force in the Indian Territory, except so far as they are in conflict with this act, are intended to be repealed or in any manner affected by this act, but all such laws are to remain in full force and effect in said Territory.

It is only, then, in case of irreconcilable conflict that any previous statutes can be taken as repealed, because one statute is not to be construed as a repeal of another if it be possible to reconcile the two with each other.

McCool v. *Smith*, 66 U. S., 218.
Wood v. *United States*, 16 Pet., 342.

We contend, therefore, that in view of all these statutes that appellate jurisdiction for capital cases still remains in the Supreme Court of the United States.

The second paragraph of act of March 1, 1895, provides for appeals from the final decisions of the United States court of appeals in the Indian Territory to the circuit court of appeals for the eighth circuit.

By act of January 20, 1897, heretofore cited, jurisdiction of the Supreme Court of offenses not capital was withdrawn from the Supreme Court and was vested in the circuit court of appeals.

Thus it would seem, according to the contention of the United States attorney, that appeals in capital cases go to the court of appeals in the Indian Territory and stop there, while according to the provisions of the above-cited laws appeals in cases not capital can still be taken for further review from the Indian Territory appellate court to the circuit court of appeals. There is no law anywhere giving appellate jurisdiction to the circuit court of appeals of capital crimes.

It would be difficult to believe that Congress intended to give greater advantages of review in cases not capital than in capital crimes.

That would not be in harmony with the spirit of the law, public policy, and those general principles which lie at the foundation of justice and which afford protection to life.

Again, the United States court of appeals, in the Indian Territory, established by the act of March 1, 1895, section 11, does not have as full and complete jurisdition over the trial courts in the Indian Territory as the

supreme court of Arkansas has over the nisi prius courts of that State.

It was only the jurisdiction and powers of the supreme court of Arkansas as to appeals and writs of error, and as to the trial and decisions of causes, "so far as they are applicable," which were conferred upon the appellate court in the Indian Territory. Final appellate jurisdiction of a capital crime by this court would not be "applicable" because of the previous legislation cited, and in view of what seems to be the fact that a further review of its decisions is provided by the circuit court of appeals in all felony cases not capital.

The United States attorney also takes the position that chapter 46 of Mansfield's Digest of the Laws of Arkansas is the sole law of procedure for the United States courts in the Indian Territory in criminal cases, and governs as to writs of error and appeals.

This is a doubtful position and one that may return to plague him hereafter. It opens up a grave question for discussion which it will hardly be necessary to fully argue in consideration of this motion. Suffice it to say, that the law adopting chapters 45 and 46 of Mansfield's Digest provides that when the laws of Arkansas have provided for the punishment of the same offense as the laws of the United States, then the laws of the United States shall govern as to such offense.

Is this provision confined alone to the substantive laws of the United States, or does it likewise include the procedure applicable to certain crimes? A person charged with murder by a common-law indictment,

which is without distinction as to degrees above manslaughter, might well insist that he should have twenty peremptory challenges against five for the Government, instead of ten in favor of the Government, as provided by the Arkansas statutes. He might also insist that the jury should be instructed that they had the right to qualify their verdict, in cases of conviction, by adding thereto "without capital punishment." It might be that he would be entitled to these and other substantive rights secured by the laws of procedure provided for the United States courts by the general laws of Congress on the trial of a crime which depends for its definition upon the general law.

In every system of criminal jurisprudence, substantive law and the administrative law go hand in hand; and it should be very clear indeed that Congress intended to graft the entire and exclusive procedure of one criminal code upon the substantive law of another; because the procedure in every code limits and modifies the bald definition of the crime, and the practice and decisions of the courts have made each code homogeneous and complete within itself.

For these reasons we believe this case is properly and rightfully here and that the motion should be overruled.

All of which is respectfully submitted.

JOHN H. KOOGLER,
JOHN WATKINS,
Counsel for Cyrus A. Brown, Plaintiff in Error.

No. 596. 250.

Brief for P. C. (on mo.)

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

GEORGE CURLEY, ALIAS GEORGE CULLY, plaintiff in error,
v.
THE UNITED STATES, DEFENDANT IN error.
} No. 596.

BRIEF OF ARGUMENT IN OPPOSITION TO MOTION TO DISMISS FOR WANT OF JURISDICTION.

W. H. TWINE,
Counsel for Plaintiff in Error.

< Not filed — as T. was not member of Bar of Sup. Ct. — Case considered by Court. >

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

GEORGE CURLEY, ALIAS GEORGE CULLY, plaintiff in error, v. THE UNITED STATES, DEFENDANT IN error.	No. 596.

BRIEF OF ARGUMENT IN OPPOSITION TO MOTION TO DISMISS FOR WANT OF JURISDICTION.

The statutes of the United States bearing upon the question of writs of error and appeals to the Supreme Court of the United States in criminal cases are briefly as follows:

On February 6, 1898, Congress passed a law providing for a review by writ of error by the Supreme Court of the final judgment of any court of the United States.

Supplement to United States Revised Statutes, second edition, page 639, section 6:

> SEC. 6. That hereafter in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be reexamined, reversed, or affirmed by the Supreme

> Court of the United States, upon a writ of error, under such rules and regulations as said court may prescribe.
>
> Every such writ of error shall be allowed as of right and without the requirement of any security for the prosecution of the same or for costs. Upon the allowance of every such writ of error, it shall be the duty of the clerk of the court to which the writ of error is directed to forthwith transmit to the clerk of the Supreme Court of the United States a certified transcript of the record in such case, and it shall be the duty of the clerk of the Supreme Court of the United States to receive, file, and docket the same.

By the act of May 2, 1890, in reference to the courts in the Indian Territory, provision was made for appeals and writs of error from the United States courts in the Indian Territory to the Supreme Court of the United States.

Supplement to Revised Statutes United States, second edition, page 738, section 42:

> SEC. 42. That appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States in the same manner and under the same regulations as from the circuit courts of the United States, except as otherwise provided in this act.

In the act of March 3, 1891, establishing United States circuit courts of appeals, it is further provided:

Supplement to United States Revised Statutes, second edition, page 903, section 5:

> SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing

circuit courts direct to the Supreme Court in the following cases:

In cases of conviction of a capital or otherwise infamous crime.

Section 13 of said act is as follows:

SEC. 13. Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, under this act.

The act of Congress of March 1, 1895, adopted as a part of the criminal law of the Indian Territory chapter 45 of Mansfield's Digest of the Laws of Arkansas (criminal law), with certain provisos, and chapter 46 of the same digest (Criminal Procedure). It also provided for a court of appeals in the Indian Territory.

Supplement to Revised Statutes, vol. 2, Nos. 1–5, pages 392–398:

SEC. 11. That the judges of said court shall constitute a court of appeals, to be presided over by the judge oldest in commission as chief justice of said court; and said court shall have such jurisdiction and powers in said Indian Territory and such general superintending control over the courts thereof as is conferred upon the supreme courts of Arkansas over the courts thereof by the laws of said State, as provided by chapter forty of Mansfield's Digest of the Laws of Arkansas; and the provisions of said chapter, so far as they relate to the jurisdiction and powers of said supreme court of Arkansas as to appeals and writs of error, and as

to the trial and decision of causes, so far as they are applicable, shall be, and they are hereby, extended over and put in force in the Indian Territory; and appeals and writs of error from said courts in said districts to said appellate court in criminal cases shall be prosecuted under the provisions of chapter forty-six of said Mansfield's digest, by this act put in force in the Indian Territory. But no one of said judges shall sit in said appellate court in the determination of any cause in which an appeal is prosecuted from the decision of any court over which he presided. In case of said presiding judge being absent, the judge next oldest in commission shall preside over said appellate court, and in such case two of said judges shall constitute a quorum. In all cases where the court is equally divided in opinion, the judgment of the court below shall stand affirmed.

Writs of error and appeals from the final decisions of said appellate court shall be allowed, and may be taken to the circuit court of appeals for the eighth judicial circuit in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States.

* * * * *

SEC. 13. That none of the provisions of any other acts, or of any of the laws of the United States, or of the State of Arkansas, heretofore put in force in said Indian Territory, except so far as they come in conflict with the provisions of this act, are intended to be repealed, or in any manner affected by this act, but all such acts and laws are to remain in full force and effect in said Territory.

The act of January 25, 1897, withdrew from the Supreme Court jurisdiction of criminal cases not capital.

29 Vol. Statutes at Large, page 492.

CHAP. 68. That so much of section five of the act entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March third, eighteen hundred and ninety-one, as reads "in cases of conviction of a capital or otherwise infamous crime," be amended by striking out the words "or otherwise infamous," so that the same will read "in cases of conviction of a capital crime;" and that appeals or writs of error may be taken from the district courts or circuit courts to the proper circuit court of appeals in cases of conviction of an infamous crime not capital: *Provided*, That no case now pending in the Supreme Court or in which an appeal or writ of error shall have been taken or sued out before the passage of this act shall be hereby affected, but in all such cases the jurisdiction of the Supreme Court shall remain, and said Supreme Court shall proceed therein as if this act had not been passed.

Approved, January 20, 1897.

ARGUMENT.

The United States attorney contends that the United States court for the northern district and the United States court of appeals in the Indian Territory, are not circuit or district courts. They may not be such courts, in terms, and we do not claim that the several United States courts in the Indian Territory are circuit and district courts properly; but they are United States courts, and punish violations of the general laws of Congress occurring within the Indian Territory, as well as the

violations of the special laws enacted for the Territory. They are United States courts, created by Congress to enforce all laws of the United States, general or special, within the Indian Territory.

This is not an organized Territory with a local government and a local legislature chosen by the people to make the laws for it. Congress gave us the government and the laws, and provided the courts to administer these laws. These courts are therefore as much United States courts as the circuit or district courts, with even a more extended jurisdiction within the limits of the Territory. They are a part of the judicial system of the United States, charged with the administration of the laws within the Territory, and are under the supervision and control of the Supreme Court of the United States as completely as any courts can be which are created by act of Congress.

The act of February 6, 1889, heretofore cited, provides for the review by writ of error of the final judgment of any court of the United States in capital cases. It also provides that such writ of error shall be allowed as a matter of right, and prescribes the duties of the clerk of the court where the case is tried and the duties of the clerk of the Supreme Court, and the manner of suing out the writ of error, and limits the time.

This statute is perhaps declaratory of the right, which a person accused of a capital offense against the laws of the United States at all times had, that of having his case reviewed by the highest tribunal of the land on a proper case made and presented.

JURISDICTION AS TO CRIMES.

The original act creating United States courts of the Indian Territory gave them a limited jurisdiction.

Supplement to United States Revised Statutes, second edition, page 671:

> SEC. 5. That the court hereby established shall have exclusive original jurisdiction over all offenses against the laws of the United States committed within the Indian Territory as in this act defined not punishable by death or by imprisonment at hard labor.

Under these statutes jurisdiction as to crimes punishable with death or imprisonment at hard labor was retained by the United States district courts at Fort Smith, Ark., and Paris, Tex.

By the act of May 2, 1890, the criminal jurisdiction of the courts in the Indian Territory was somewhat enlarged.

Supplement United States Revised Statutes, second edition, pp. 731–738:

> SEC. 33. That the provisions of chapter forty-five of the said general laws of Arkansas entitled "Criminal law," except as to the crimes and misdemeanor mentioned in the proviso to this section, and the provisions of chapter forty-six of said general laws of Arkansas entitled "Criminal Procedure," as far as they are applicable, are hereby extended over and put in force in the Indian Territory, and jurisdiction to enforce said provisions is hereby conferred upon the United States court therein.
>
> *Provided*, That in all cases where the laws of the United States and the said criminal laws of Arkan-

sas have provided for the punishment of the same offenses the laws of the United States shall govern as to such offenses.

Jurisdiction of the higher felonies was still retained by the courts at Fort Smith and Paris.

By the act of March 1, 1895, full, original, and exclusive jurisdiction of all offenses against the laws of the United States was conferred upon the courts in the Indian Territory.

Statutes at Large, page —, section 9:

> This act also readopts chapters forty-five and forty-six contained in Mansfield's Digest of the Laws of Arkansas.
>
> SEC. 4. * * * The provisions of chapter forty-five of Mansfield's Digest of the General Laws of Arkansas, entitled "Criminal law," except as to the crimes and misdemeanors mentioned in the proviso of this section, and chapter forty-six of said laws of Arkansas, contained in said Digest, entitled "Criminal Procedure," and chapter ninety-one of said general laws, regulating the jurisdiction and procedure before justices of the peace in civil cases, be, and they are hereby, extended to and put in force in the Indian Territory; and the jurisdiction to enforce said provisions is hereby conferred upon the United States court in the Indian Territory: *Provided*, That in all cases where the laws of the United States and the said criminal laws of Arkansas have provided for the punishment of the same offenses the laws of the United States shall govern as to said offenses, except for the crime of larceny, the punishment for which shall be that prescribed by the laws of the State of Arkansas, any law in force in said Indian Territory to the contrary notwithstanding.

The act of February 6, 1889, clearly gave to the Supreme Court the right to review. The United States attorney contends, however, that this law is modified and repealed by the act of March 3, 1891. It was modified by the latter act, but in no sense repealed as to the jurisdiction of capital cases. This court has decided that the latter act places the court in the Indian Territory on the same footing with regard to writs of error and appeals to the Supreme Court as that occupied by the circuit and district courts of the United States. (*McLish* v. *Roff*, 141 U. S., 664; *In re Chausen*, 140 U. S., 200.)

But the United States attorney also contends that the act of March 1, 1895, repeals section 13, giving this right of appeal from the Indian Territory courts, by establishing another appellate tribunal in the Indian Territory for that purpose.

There are no words of repeal in the last-named statute; on the contrary, in section 13 of that act it is especially provided that none of the provisions of any other act, or of any of the laws of the United States, or of the State of Arkansas, heretofore put in force in the Indian Territory, except so far as they are in conflict with this act, are intended to be repealed or in any manner affected in said Territory.

It is only, then, in case of irreconcilable conflict that any previous statutes can be taken as repealed; because one statute is not to be construed as a repeal of another if it be possible to reconcile the two with each other.

McCool v. *Smith*, 66 U. S., 218.

Wood v. *United States*, 16 Pet., 342.

We contend therefore that, in view of all these statutes, appellate jurisdiction for capital cases still remains in the Supreme Court of the United States.

The second paragraph of March 1, 1895, provides for appeals from the final decisions of the United States court of appeals in the Indian Territory to the circuit court of appeals for the eighth circuit.

By the act of January 20, 1897, heretofore cited, jurisdiction of the Supreme Court of offenses not capital was withdrawn from the Supreme Court and was vested in the circuit court of appeals.

Thus it would seem, according to the contention of the United States attorney, that appeals in capital cases go to the court of appeals in the Indian Territory and stop there; which, according to the provisions of the above-cited laws, appeals in cases not capital can still be taken for further review from the Indian Territory appellate court to the circuit court of appeals. There is no law anywhere giving appellate jurisdiction to the circuit court of appeals of capital crimes.

It would be difficult to believe that Congress intended to give greater advantages of review in cases not capital than in capital crimes.

That would not be in harmony with the spirit of the law, public policy, and those general principles which lie at the foundation of justice and which afford protection to life.

Again, the United States court of appeals in the Indian Territory, established by the act of March 1, 1895, section 11, does not have as full and complete jurisdiction over the trial courts in the Indian Territory

as the supreme court of Arkansas has over the nisi prius courts of that place.

It was only the jurisdiction and powers of the supreme court of Arkansas as to appeals and writs of error, and as to the trial and decision of causes, "so far as they are applicable," which were conferred upon the appellate court in the Indian Territory. Final appellate jurisdiction of a capital crime by this court "would not be applicable," because of the previous legislation cited and in view of what seems to be the fact that a further review of its decisions is provided by the circuit court of appeals in all felony cases not capital.

The United States attorney also takes the position that chapter 46 of Mansfield's Digest of the Laws of Arkansas is the sole law of procedure for the United States courts in the Indian Territory in criminal cases and governs as to writs of error and appeals.

This is a doubtful position and one that may return to plague him hereafter. It opens up a grave question for discussion which it will hardly be necessary to fully argue in consideration of this motion. Suffice it to say, that the law adopting chapters 45 and 46 of Mansfield's Digest provides that when the laws of Arkansas have provided for the punishment of the same offense as the laws of the United States, then the laws of the United States shall govern as to such offense.

Is this provision confined alone to the substantive laws of the United States, or does it likewise include the procedure applicable to certain crimes? A person charged with murder by the common-law indictment,

which is without distinction as to degrees above manslaughter, might well insist that he should have twenty peremptory challenges against five for the Government, instead of ten in favor of the Government as provided by the Arkansas statute. He might also insist that the jury should be instructed that they had the right to qualify their verdict in cases of conviction by adding thereto "without capital punishment." It might be that he would be entitled to these substantive rights, secured by the laws of procedure provided for the United States courts by the general laws of Congress on the trial of a crime which depends for its definition upon the general law. In every system of criminal jurisprudence substantive law and the administrative law go hand in hand, and it should be very clear indeed that Congress intended to graft the entire and exclusive procedure of one criminal code upon the substantive law of another, because the procedure in every code limits and modifies the bald definition of the crime, and the practice and decisions of the courts have made each code homogeneous and complete within itself.

For these reasons we believe this case is properly and rightfully here, and that the motions should be overruled.

All of which is respectfully submitted.

W. H. TWINE,

Counsel for George Curley, Plaintiff in Error.

249 250

No. 595 and 596.

Def. of Atty. Gen.l (Richards & Soper for U. S. (on mo.)

Filed April 16, 1898.

FILED
APR 16 1898
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

CYRUS A. BROWN, PLAINTIFF IN error, v. THE UNITED STATES. } No. 595.

GEORGE CURLEY, ALIAS GEORGE Cully, v. THE UNITED STATES. } No. 596.

MOTION TO DISMISS, AND BRIEF IN SUPPORT THEREOF.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

CYRUS A. BROWN, PLAINTIFF IN error, v. THE UNITED STATES.	No. 595.
GEORGE CURLEY, ALIAS GEORGE Cully, plaintiff in error, v. THE UNITED STATES.	No. 596.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

Now comes the United States of America, by J. K. Richards, Solicitor-General, and P. L. Soper, United States attorney for the northern district of the Indian Territory, and moves the court to dismiss the writs of error allowed in the above-entitled causes for the reason that this honorable court has no jurisdiction to entertain said writs of error, or to pass upon any of the matters

and things alleged in the record in said causes for want of jurisdiction under the law.

J. K. RICHARDS,
Solicitor-General.

P. L. SOPER,
United States Attorney for the Northern District of the Indian Territory.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

CYRUS A. BROWN, PLAINTIFF IN error, v. THE UNITED STATES.	No. 595.
GEORGE CURLEY, ALIAS GEORGE Cully, v. THE UNITED STATES.	No. 596.

BRIEF IN SUPPORT OF MOTION TO DISMISS.

STATEMENT OF THE CASES.

Cyrus A. Brown, plaintiff in error in case No. 595, was indicted in the United States court for the northern district of the Indian Territory, charged with the crime of murder, which indictment was filed in the United States court for the Indian Territory, northern district, sitting at Muscogee on the 10th day of December, A. D. 1896.

On the 17th day of December, A. D. 1897, he was convicted of the crime of murder in said court, and the judgment of the court sentencing him to death was made on the 24th day of December, A. D. 1897. On the 1st day of February, A. D. 1898, the plaintiff in error filed a petition in said court for a writ of error from the Supreme Court of the United States and filed an assignment of errors. On February 8, 1898, a writ of error was allowed in said cause by Hon. David J. Brewer, associate justice of the Supreme Court of the United States, and on the same day a citation was issued in said cause, service of which was acknowledged on the 16th day of February, A. D. 1898. (See transcript of record, pp. 25–27.) Pursuant to the writ of error in said cause a transcript of the record in said cause was filed in the office of the clerk of the Supreme Court of the United States on the 23d day of February, A. D. 1898. The Government has filed its motion to dismiss the writ of error in said cause, for the reason that the Supreme Court of the United States has no jurisdiction under the law to entertain said writ of error nor to pass upon any of the alleged errors in said record, because said court has no appellate jurisdiction of said cause.

George Curley, alias George Cully, plaintiff in error in case No. 596, was indicted in the United States court for the northern district of the Indian Territory sitting at Vinita charged with the crime of murder, which indictment was filed in open court on the 21st day of October, A. D. 1897. On the same day the defendant took a change of venue to the United States court at Muscogee,

and a transcript of the record and the original indictment was forwarded to the clerk of the United States court at Muscogee, Ind. T. On the 13th day of December, 1897, at the December term of the United States court for the northern district of the Indian Territory, at Muscogee, the indictment heretofore found was re-referred to the grand jury and upon the same day the grand jury returned into open court at Muscogee, Ind. T., a new indictment against the defendant, for murder. On the 22d day of December, A. D. 1897, the defendant was found guilty of the crime of murder, and on the 24th day of December, A. D. 1897, judgment of the court was pronounced upon said defendant, sentencing him to death.

On February 11, 1898, plaintiff in error, through his attorney, W. H. Twine, filed a petition for a writ of error from the Supreme Court of the United States, and also filed his specification of error. A writ of error was allowed by Hon. David J. Brewer, Associate Justice, on the 19th day of February, 1898, and on the 23d day of February, 1898, service of the citation issued out of this honorable court was acknowledged. A transcript of the entire record was filed in the office of the clerk of the Supreme Court of the United States on March 1, 1898. The Government has filed its motion to dismiss the writ of error in said case for the reason that the Supreme Court of the United States has no jurisdiction under the law to entertain said writ of error, nor to pass upon any of the alleged errors in said record, because said court has no appellate jurisdiction of said cause.

BRIEF OF ARGUMENT IN SUPPORT OF MOTION TO DISMISS FOR WANT OF JURISDICTION.

The United States court in the Indian Territory was established by an act of Congress approved March 1, 1889 (Sup. R. S. U. S., vol. 1, 2d ed., p. 670). No jurisdiction over felonies was conferred upon this court. Appeals and writs of error were allowed to the Supreme Court of the United States where the amount in dispute exceeded $1,000. (See sec. 5 of said act.)

On February 6, 1889 (Sup. R. S. U. S., vol. 1, 2d ed., p. 638), Congress passed an act providing for writs of error in capital cases. So much of section 6 of said act as is applicable is as follows:

> SEC. 6. That hereafter in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court, against the respondent, shall, upon the application of the respondent, be reexamined, reversed, or affirmed by the Supreme Court of the United States upon a writ of error, under such rules and regulations as said court may prescribe.

On May 2, 1890 (Sup. R. S. U. S., vol. 1, 2d ed., p. 732), two additional places were named for the holding of court in the Indian Territory. The court was divided into three divisions, and certain chapters of the general laws of the State of Arkansas, as found in Mansfield's Digest, were adopted "in so far as applicable," and put in force in the Indian Territory. Section 42 of said act is as follows:

> SEC. 42. That appeals and writs of error may be taken and prosecuted from the decisions of the

> United States court in the Indian Territory to the Supreme Court of the United States in the same manner and under the same regulations as from the circuit courts of the United States, except as otherwise provided in this act.

On March 3, 1891, Congress established United States circuit courts of appeals. (Sup. R. S. U. S., vol. 1, 2d ed., p. 901.) So much of section 5 of said act as is pertinent herein is as follows:

> That appeals and writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:
>
> In cases of conviction of a capital or otherwise infamous crime.

That appeals and writs of error from the United States court in the Indian Territory are not to be taken under said section is shown by the enactment of section 13 of said act, which is as follows:

> SEC. 13. Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States under this act.

On March 1, 1895, Congress passed an act (Sup. R. S. U. S., vol. 2, Nos. 1–5, pp. 392–398) dividing the United States court in the Indian Territory into three judicial districts, and provided for the appointment of two additional judges and for the creation of the United States court of appeals in the Indian Territory, and adopted as a Federal statute, without qualification or

modification, chapter 46 of Mansfield's Digest of the Laws of the State of Arkansas, entitled "Criminal procedure." The language of the act adopting chapter 46 of Mansfield's Digest is as follows:

> * * * The provisions of chapter forty-five of Mansfield's Digest of the General Laws of Arkansas, entitled "Criminal Law," except as to the crimes and misdemeanors mentioned in the proviso of this section, and chapter forty-six of said laws of Arkansas contained in said digest, entitled "Criminal Procedure," and chapter ninety-one of said general laws, regulating the jurisdiction and procedure before justices of the peace in civil cases, be, and they are hereby, extended to and put in force in the Indian Territory; and the jurisdiction to enforce said provisions is hereby conferred upon the United States court in the Indian Territory. * * *

Section 11 of said act defining the jurisdiction and powers of the United States court of appeals in the Indian Territory, in so far as the same is applicable, is as follows:

> SEC. 11. That the judges of said court shall constitute a court of appeals, to be presided over by the judge oldest in commission as chief justice of said court.
>
> And said court shall have such jurisdiction and powers in said Indian Territory, and such general superintending control over the courts thereof, as is conferred upon the supreme court of Arkansas over the courts thereof by the laws of said State, as provided by chapter forty of Mansfield's Digest of the Laws of Arkansas, and the provisions of said chapter, so far as they relate to the jurisdiction and powers of said supreme court of Arkansas as to appeals and writs of error, and as to the trial and

decision of causes, so far as they are applicable, shall be and they are hereby extended over and put in force in the Indian Territory.

And appeals and writs of error from said court in said districts to said appellate court in criminal cases shall be prosecuted under the provisions of chapter forty-six of said Mansfield's Digest by this act put in force in the Indian Territory. * * *

Writs of error and appeals from the final decision of said appellate court shall be allowed, and may be taken to the circuit court of appeals for the eighth judicial circuit in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States. * * *

Said appellate court shall be held at South McAlester, in the Choctaw Nation, and it shall hold two terms in each year at such times and for such periods as may be fixed by the court.

Section 13 of said act is as follows:

SEC. 13. That none of the provisions of any other acts, or of any of the laws of the United States, or of the State of Arkansas, heretofore put in force in said Indian Territory, except so far as they come in conflict with the provisions of this act, are intended to be repealed or in any manner affected by this act, but all such acts and laws are to remain in full force and effect in said Territory.

On January 20, 1897, Congress passed an act (Sup. R. S. U. S., vol. 2, No. 6, p. 541) to withdraw from the Supreme Court jurisdiction of infamous offenses not capital and confer the same on the circuit court of appeals, which said act is as follows:

That so much of section five of the act entitled "An act to establish circuit courts of appeals and to

define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March third, eighteen hundred and ninety-one, as reads "in cases of conviction of a capital or otherwise infamous crime," be amended by striking out the words "or other infamous," so that the same will read "in cases of conviction of a capital crime," and that appeals or writs of error may be taken from the district courts or circuit courts to the proper circuit court of appeals in cases of conviction of an infamous crime not capital:

Provided, That no case now pending in the Supreme Court, or in which an appeal or writ of error shall have been taken or sued out before the passage of this act, shall be hereby affected, but in all such cases the jurisdiction of the Supreme Court shall remain, and said Supreme Court shall proceed therein as if this act had not been passed.

These are all the acts of Congress upon the subject. Neither the United States court for the northern district of the Indian Territory, to which the writ of error was sued out, nor the United States court of appeals in the Indian Territory is a circuit or district court of the United States. The equity practice of the circuit court of the United States does not prevail in the Indian Territory, because the practice is governed by the code of civil procedure of Arkansas, found in Mansfield's Digest and adopted by act of Congress approved May 2, 1890.

Section 16 of the act of Congress approved March 1, 1889, establishing the United States court in the Indian Territory, is as follows:

That the judge of the court herein established shall have the same authority to issue writs of habeas

corpus, injunction, mandamus, and other remedial process as exists in the circuit court of the United States.

Section 2 of the act of Congress approved March 1, 1895, is as follows:

> The judges shall have, within the judicial districts for which they are appointed, all such authority, both in term time and vacation, as to all matters and causes, both criminal and civil, pending or that may be brought in said districts, and shall have the same superintending control over commissioners' courts therein, and the same authority in the judicial districts to issue writs of habeas corpus and prohibition, injunction, mandamus, certiorari, and other remedial and final process as is now by law invested in the judge of the United States court in the Indian Territory or in the circuit and district courts of the United States.

These provisions of law define the powers of the judges and confer additional authority upon them. This authority specifically conferred upon the judges can not make the courts over which they preside circuit or district courts within the meaning of the laws of the United States. A judge of the United States court in the Indian Territory is not under the direction or control of the circuit judges of the United States for the eighth judicial circuit, to which circuit the Indian Territory is attached for judicial purposes. They can not be assigned to try cases in any other district outside of the Indian Territory, and the authority of each judge to hold court in another district than the one to which he is assigned is specifically provided by the act of Congress approved March 1, 1895.

The Supreme Court of the United States in the case of *In re Mills* (135 U. S., 267–268), in passing upon a criminal case from the western district of Arkansas, which was pending in said court upon a writ of error and in which it was maintained by the plaintiff in error that the jurisdiction conferred upon the United States court in the Indian Territory under the act of Congress approved March, 1889, ousted the United States court for the western district of Arkansas of jurisdiction of said crime, said:

> The provisions of the Revised Statutes relating to impaneling of grand jurors for the district and circuit courts, title 13, chapter 15, do not apply to the court established in the Indian Territory by the act of March 1, 1889, for although the latter is a court of the United States *it is not a district or circuit court of the United States.*
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> *Reynolds* v. *United States*, 98 U. S., 145–154.
> *Ex parte Farley, Ex parte Wilson*, 40 Fed. Rep. 66.

The authority and jurisdiction of the United States court in the Indian Territory is derived solely from the three acts of Congress hereinbefore mentioned. The court in the Indian Territory is divided into three judicial districts, the northern, central, and southern, and in each district there is a judge, attorney, marshal, and clerk, and there is an additional judge appointed under the provisions of the act of Congress approved June 7, 1897. The court in the Indian Territory enforces not only all the criminal laws of the United States, as provided in section 31 of the act of Congress approved May 2, 1890, hereinbefore referred to, but also enforces the

criminal laws of the State of Arkansas, and has jurisdiction over a large class of crimes and offenses which neither the district nor circuit courts of the United States have cognizance of. The mode of procedure in criminal causes is regulated entirely since the passage of the act of Congress approved March 1, 1895, by chapter 46 of Mansfield's Digest of the Laws of the State of Arkansas, and under section 13 of said act every other Federal statute in conflict with any provision found in chapter 46 of Mansfield's Digest, entitled "Criminal procedure," is repealed, and not in force in the Indian Territory. The laws of Arkansas, adopted and put in force in the Indian Territory, are as much acts of Congress and have the same force and effect as if they had been adopted by Congress without reference to their prior existence in the State of Arkansas, and the same force and effect as if they had been set forth in extenso in the act adopting them. (See *Leak Glove Mfg. Co.* v. *Needles et al.*, 69 Fed. Rep., 68.)

The act of Congress approved February 6, 1889, was the first act providing for appellate jurisdiction of the Supreme Court of the United States in capital cases. This act was modified and repealed by the act of Congress approved March 3, 1891, creating United States circuit courts of appeals, and Congress added to the jurisdiction of capital offenses then held by the Supreme Court of the United States, "all infamous offenses," and that was the law when the act of Congress of March 1, 1895, was approved creating the United States court of appeals in the Indian Territory. There was no saving clause

concerning appeals and writs of error in this latter act, and the general rule is that if a law conferring jurisdiction is repealed without any reservation as to pending cases all such cases fall with the law.

Railroad Co. v. *Grant*, 98 U. S., 398.
Gurnee v. *Patrick County*, 137 U. S., 141.
Cincinnati Safe and Lock Co. v. *Grand Rapids Safe Dep. Co.*, 146 U. S., 54.
Wanton v. *Dewolf*, 142 U. S., 138.
Hubbard v. *Soby*, 146 U. S., 56.
National Exchange Bank v. *Peters*, 144 U. S., 570.
Ogden v. *United States*, 148 U. S., 390.

At the time of the passage of the act of March 1, 1895, there were then pending in the United States circuit court of appeals for the eighth judicial circuit five cases from the United States court in the Indian Territory, and under the decisions above cited the court of appeals held that its jurisdiction to pass upon these cases was taken away by the act of Congress approved March 1, 1895, and that this act repealed section 13 of the act of Congress approved March 3, 1891, hereinbefore cited and set forth.

The act of March 1, 1895, provided that all appeals and writs of error should be taken from the several courts in the Territory to the United States court of appeals created by that act, without any exception, civil or criminal. As said by Southerland upon statutory construction:

> An affirmative enactment of a new rule implies a negative of whatever is not included or is different; and if, by the language used, a thing is limited to be done in a particular form or manner, it in-

cludes a negative that it shall not be done otherwise. (See Southerland on Statutory Construction, section 140, citing *Wells* v. *Supervisors*, 102 U. S., 625.)

Before the mandate of the United States circuit court of appeals was sent down in those cases Congress remedied this omission in the act of March 1, 1895, by an act approved February 8, 1896 (Sup. R. S. U. S., vol. 2, No. 6, p. 446), which act is as follows:

> That the jurisdiction of the United States circuit court of appeals for the eighth judicial circuit be, and is hereby, extended to all suits at law or equity now pending therein upon writ of error to or appealed from the United States court in the Indian Territory in all cases wherein such writ of error or appeal would have vested jurisdiction in said circuit court of appeals but for the act of Congress approved March first, eighteen hundred and ninety-five, entitled "An act to provide for the appointment of additional judges of the United States court in the Indian Territory, and for other purposes."

The cases were reinstated and proceeded to final determination.

Section 11 of the act of March 1, 1895, hereinbefore set forth, provided for an entirely new and different mode of appellate procedure from the trial court in the Indian Territory. Prior to its passage the courts in the Indian Territory were upon the same basis as the circuit and district courts of the United States under the provisions of section 13 of the act of Congress approved March 3, 1891. See *McLish* v. *Roff* (141 U. S., 664), in which the court says:

> The writ of error is taken under the act of March 3, 1891 (26 Stat., 826, c. 517), which, as we have

decided in *In re Claasen* (140 U. S., 200), went immediately into effect on its enactment. The thirteenth section of that act placed the United States court in the Indian Territory on the same footing with regard to writs of error and appeals to this court as that occupied by the circuit and district courts of the United States.

Section 11 of the act of March 1, 1895, provides:

> And appeals and writs of error from said court in said districts to the said appellate court, in criminal cases, shall be prosecuted under the provisions of chapter 46 of said Mansfield's Digest by this act put in force in the Indian Territory.

All criminal cases, whether capital, infamous, or misdemeanor, are tried under the provisions of chapter 46 of Mansfield's Digest of the Laws of the State of Arkansas, put in force by said act. It is the law of Congress for the procedure of the United States court in the Indian Territory in criminal causes, and its provisions concerning writs of error and appeals must be followed in taking the same to the United States court of appeals in the Indian Territory. No exception is made of any class of cases. The act of March 1, 1895, extended the jurisdiction of the United States court in the Indian Territory to capital cases and other infamous crimes, the jurisdiction of which had heretofore vested in the United States courts at Fort Scott, Kans., Fort Smith, Ark., and Paris, Tex., and provided that all such offenses shall be prosecuted in the United States court in the Indian Territory after the first day of September, 1896. (See section 9 of said act.)

From this provision it will be seen that Congress intended that on and after the 1st day of September, 1896, the United States court in the Indian Territory should have exclusive jurisdiction of all offenses, of whatsoever character, committed within the Indian Territory, and that they should be tried in the trial courts thereof under the provisions of chapter 46 of Mansfield's Digest of the Laws of the State of Arkansas, entitled "Criminal procedure," and that from the trial court an appeal or writ of error in any of said cases should be taken to the United States court of appeals in the Indian Territory, under chapter 46 of Mansfield's Digest, put in force in said Indian Territory by said act. From March 1, 1896, all appeals and writs of error in criminal cases have been taken to the United States court of appeals in the Indian Territory until the present writ of error was sued out. That the United States court of appeals has exercised jurisdiction of capital cases upon appeal from the United States court for the southern district of the Indian Territory for the crime of murder, see *Watkins* v. *The United States*, 41 Southwestern Rep., 1044.

It may be claimed that the Supreme Court of the United States has jurisdiction of the writ of error from the United States court for the northern district of the Indian Territory in a capital case under the provisions of the act of Congress approved January 20, 1897, hereinbefore set forth. That this contention can not be maintained we believe is clear, for the reason that the United States court for the northern district of the

Indian Territory is not a circuit court of the United States under the decisions hereinbefore cited. The act of Congress of January 20, 1897, was amendatory solely to section 5 of the act of March 3, 1891, and no appeal was ever allowed from the United States court in the Indian Territory under section 5 of said act of March 3, 1891, but only because of the provisions of section 13 of said act, which has been repealed by the act of Congress approved March 1, 1895, establishing the United States court of appeals in the Indian Territory. If that contention were correct, then, under the same reasoning, a writ of error could be sued out from the trial court in the Indian Territory direct to the United States circuit court of appeals for the eighth judicial circuit in an infamous offense not capital. That this can not be done the United States circuit court of appeals has already decided. (See *Miller* v. *C. O. & G. Rwy. Co.*, 72 Fed. Rep., 289.)

But it may be maintained that a writ of error may still be sued out to the United States court in the Indian Territory from the Supreme Court of the United States under section 6 of the act of Congress approved February 6, 1889. We do not think, however, that such a position would be well taken, for the reason that the very language of section 11 of the act of Congress approved March 1, 1895, provides for the express manner of appeal in all criminal cases to the United States court of appeals in the Indian Territory, and that where an express and particular mode of taking an appeal or writ of error to a specific court is provided for by statute it necessarily repeals all statutes conflicting therewith.

(See Southerland on Statutory Construction, section 140 and cases cited.)

But it is not necessary to look for an implied repeal, as section 13 of this same act expressly repeals all acts of the United States in conflict with the provisions contained in section 11 of said act of March 1, 1895, or in conflict with any other provision contained in said act.

The act of February 6, 1889, has already been construed by this court. The supreme court of the District of Columbia is a court of the United States as much so as the United States court in the Indian Territory or the United States court of appeals in the Indian Territory. (See *Embry* v. *Palmer*, 107 U. S., 10.)

In the case of *Cross* v. *United States* (145 U. S., 571), the act of February 6, 1889, was passed upon. In that case it is said:

> It is contended on behalf of the Government that the writ of error will not lie because the supreme court of the District of Columbia is not a court of the United States, within the intent and meaning of the section. *McAllister* v. *United States* (141 U. S., 174) is cited with the decisions referred to therein as sustaining that view; but it is to be remembered that that case referred to territorial courts only, and, moreover, if the disposal of the motion turned on this point, the words "any court of the United States" are so comprehensive that, used as they are in connection with convictions subject to the penalty of death, the conclusion might be too technical that Congress intended to distinguish between courts of one class and of the other. But the difficulty with the section is that it manifestly does not contemplate the allowance of a writ

of error to any appellate tribunal, but only to review the final judgment of the court before which the respondent was tried, where such judgment could not otherwise be reviewed by writ of error or appeal. It is the final judgment of the trial court that may be reexamined upon the application of the respondent, and it is to that court the cause is to be remanded, and by that court that the judgment of this court is to be carried into execution. The obvious object was to secure a review by some other court than that which passed upon the case at nisi prius. Such review by two other courts was not within the intention, as the judiciary act of March 3, 1891, shows. This is made still clearer by the further provision that no such writ of error "shall be sued out or granted unless a petition therefor shall be filed with the clerk of the court in which the trial shall have been had during the same term or within such time, not exceeding sixty days next after the expiration of the term of the court at which the trial shall have been had, as the court may for cause allow by order entered of record." This language is entirely inapplicable to the prosecution of a writ of error to the judgment of an appellate tribunal affirming the judgment of the trial court. And the case before us shows this.

See also *Cross* v. *Burke*, 146 U. S., 84.

In re Heath, 144 U. S., 92.

That the United States court of appeals in the Indian Territory is not a circuit court of the United States see *In re Mills*, 135 U. S., 267–268.

It is an appellate court, and its decisions are final unless made subject to review by some express provision of law. The only provision relating to writs of error and appeals from the United States court of appeals in the Indian

Territory is contained in section 11 of the act of March 1, 1895, and is as follows:

> Appeals and writs of error from the final decision of said appellate court shall be allowed and may be taken to the circuit court of appeals for the eighth judicial circuit in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States.

This provision would not apply to capital cases, and there is no provision of law providing for a writ of error in a capital case to the United States court of appeals in the Indian Territory.

It would seem that the court of appeals in the Indian Territory, being a court of the United States, is analogous to the supreme court of the District of Columbia, and bears the same relation to the United States court in the Indian Territory that the supreme court of the District of Columbia bore to the inferior courts of the District of Columbia. No appeal could be taken or writ of error sued out to the supreme court of the District of Columbia in a capital case because, as this court has said in *Ex parte Bigelow* (113 U. S., 329):

> No appeal or writ of error in such case as that lies to this court. The act of Congress has made the judgment of that court conclusive, as it had a right to do, and the defendant, having one review of his trial and judgment, has no special reason to complain.

We are, therefore, in view of the statutes and decisions above cited, of the opinion that the Supreme Court of the United States has no appellate jurisdiction of capital cases from the United States court for the northern

district of the Indian Territory, and that said appellate jurisdiction is by section 11 of the act of Congress approved March 1, 1895, hereinbefore cited and set forth, vested exclusively and finally in the United States court of appeals in the Indian Territory, and not in this honorable court.

In conclusion, it may be proper to say that this motion is submitted because of the fact that there are now pending in the Indian Territory about one hundred murder cases. Convictions will doubtless be had in many of these cases, and in all such cases of conviction writs of error will no doubt be sued out of this court, or to the United States court of appeals, if it shall be determined that that court has jurisdiction of such cases.

Notices of the foregoing motion have been served upon the plaintiffs in error and their counsel in the court below, and proof of service filed in the clerk's office.

JOHN K. RICHARDS,
Solicitor-General.

P. L. SOPER,
United States Attorney,
Northern District of the Indian Territory.

BROWN *v.* UNITED STATES.

CURLEY *v.* UNITED STATES.

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ERROR TO THE UNITED STATES COURT IN THE INDIAN TERRITORY.

Nos. 249, 250. Submitted April 25, 1898.—Decided October 24, 1898.

This court has no appellate jurisdiction of capital cases from the United States court from the Northern District of the Indian Territory, such appellate jurisdiction being vested exclusively in the United States Court of Appeals in the Indian Territory.

CYRUS A. Brown, plaintiff in error in case No. 249, was indicted in the United States court for the Northern District of the Indian Territory, charged with the crime of murder, which indictment was filed in the United States court for the Indian Territory, Northern District, sitting at Muscogee on the 10th day of December, A.D. 1896.

On the 17th day of December, A.D. 1897, he was convicted of the crime of murder in said court, and the judgment of the court sentencing him to death was made on the 24th day of December, A.D. 1897. On the 1st day of February, A.D. 1898, the plaintiff in error filed a petition in said court for a writ of error from the Supreme Court of the United States, and filed an assignment of errors. On February 8, A.D. 1898, a writ of error was allowed in said cause, and on the same day a citation was issued in said cause, service of which was acknowledged on the 16th day of February, A.D. 1898. Pursuant to the writ of error in said cause a transcript of the record in said cause was filed in the office of the clerk of the Supreme Court of the United States on the 23d day of February, A.D. 1898. The government has filed its motion to

dismiss the writ of error in said cause, for the reason that the Supreme Court of the United States has no jurisdiction under the law to entertain said writ of error, nor to pass upon any of the alleged errors in said record, because said court has no appellate jurisdiction of said cause.

George Curley, alias George Cully, plaintiff in error in case No. 250, was indicted in the United States court for the Northern District of the Indian Territory, sitting at Vinita, charged with the crime of murder, which indictment was filed in open court on the 21st day of October, A.D. 1897. On the same day the defendant took a change of venue to the United States court at Muscogee, and a transcript of the record and the original indictment were forwarded to the clerk of the United States court at Muscogee, Indian Territory. On the 13th day of December, A.D. 1897, at the December term of the United States court for the Northern District of the Indian Territory, at Muscogee, the indictment heretofore found was referred to the grand jury, and upon the same day the grand jury returned into open court at Muscogee, Indian Territory, a new indictment against the defendant for murder. On the 22d day of December, A.D. 1897, the defendant was found guilty of the crime of murder, and on the 24th day of December, A.D. 1897, judgment of the court was pronounced upon said defendant, sentencing him to death.

On February 11, 1898, plaintiff in error, through his attorney, W. H. Twine, filed a petition for a writ of error from the Supreme Court of the United States, and also filed his specification of error. A writ of error was allowed, on the 19th day of February, 1898, and on the 23d day of February, 1898, service of the citation issued out of this court was acknowledged. A transcript of the entire record was filed in the office of the clerk of the Supreme Court of the United States on March 1, 1898. The government has filed its motion to dismiss the writ of error in said case for the reason that the Supreme Court of the United States has no jurisdiction under the law to entertain said writ of error, nor to pass upon any of the alleged errors in said record, because said court has no appellate jurisdiction of said cause.

Mr. Solicitor General and *Mr. P. L. Soper* for the motion.

Mr. John H. Koogler and *Mr. John Watkins* on behalf of Brown, and *Mr. W. H. Twine* on behalf of Curley, opposing.

MR. JUSTICE SHIRAS, after stating the case, delivered the opinion of the court.

By the act of Congress approved March 1, 1889, c. 333, 25 Stat. 783, there was established a United States court for the Indian Territory. The act conferred no jurisdiction over felonies, but by the fifth section exclusive original jurisdiction was conferred over all offences against the laws of the United States committed within the Indian Territory, not punishable by death or by imprisonment at hard labor. Jurisdiction was conferred in all civil cases between citizens of the United States who are residents of the Indian Territory where the value of the thing in controversy shall amount to one hundred dollars or more. The final judgment or decree of the court, where the value of the matter in dispute, exclusive of costs, exceeds one thousand dollars, may be reviewed and reversed or affirmed in the Supreme Court of the United States upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a Circuit Court.

On March 1, 1895, Congress passed an act, c. 145, 28 Stat. 693, dividing the Indian Territory into three judicial districts, and providing for the appointment of two additional judges. This act extended the jurisdiction of the United States court in said Territory to capital cases and other infamous crimes, the jurisdiction over which had theretofore been vested in the United States courts at Fort Scott, Kansas, Fort Smith, Arkansas, and Paris, Texas, and provided that all such offences should be prosecuted in the United States court in the Indian Territory after the first day of September, 1896.

The eleventh section is as follows:

"That the judges of said court shall constitute a court of appeals, to be presided over by the judge oldest in commission

as chief justice of said court. And said court shall have such jurisdiction and powers in said Indian Territory and such general superintending control over the courts thereof as is conferred upon the Supreme Court of Arkansas over the courts thereof by the laws of said State, as provided by chapter forty of Mansfield's Digest of the Laws of Arkansas, and the provisions of said chapter, so far as they relate to the jurisdiction and powers of said Supreme Court of Arkansas as to appeals and writs of error, and as to the trial and decision of cases, so far as they are applicable, shall be, and they are hereby, extended over and put in force in the Indian Territory;

"And appeals and writs of error from said court in said districts to said appellate court, in criminal cases, shall be prosecuted under the provisions of chapter forty-six of Mansfield's Digest, by this act put in force in the Indian Territory."

These enactments clearly provide that writs of error in criminal cases shall be taken to the appellate court of the United States for the Indian Territory, and dispose of the question before us, unless there are other provisions of the acts of Congress which prevent such a conclusion.

The counsel for defendants in error contend that the act of February 6, 1889, c. 113, 25 Stat. 655, gave to the Supreme Court the right to review. The sixth section of that act is in the following words:

"That hereafter, in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be reëxamined, reversed or affirmed by the Supreme Court of the United States upon a writ of error, under such rules and regulations as said court may prescribe."

It will be observed that when this law was passed the United States court for the Indian Territory did not possess jurisdiction in capital cases. That jurisdiction was *subsequently* conferred. But, even if it be conceded that the provisions of the act of February 6, 1889, might have attached or become applicable to the judgments of the United States court for the Indian Territory when jurisdiction in capital cases was ex-

tended to that court, the intention of Congress is manifested to have been otherwise by the provision above cited from the act of March 1, 1895, whereby it is provided that writs of error in capital cases shall be taken to the Court of Appeals of the United States for the Indian Territory.

This court had occasion to consider the effect of the act of February 6, 1889, in respect to the judgments of the Supreme Court of the District of Columbia in capital cases, in the case of *Cross* v. *United States*, 145 U. S. 571, and it was there said:

"It is contended on behalf of the Government that the writ of error will not lie because the Supreme Court of the District of Columbia is not a court of the United States, within the intent and meaning of the section. *McAllister* v. *United States*, 141 U. S. 174, is cited with the decision referred to therein, as sustaining that view, but it is to be remembered that that case referred to territorial courts only; and moreover, if the disposal of the motion turned on this point, the words, 'any court of the United States,' are so comprehensive that, used as they are in connection with convictions subject to the penalty of death, the conclusion might be too technical that Congress intended to distinguish between courts of one class and of the other. But the difficulty with the section is that it manifestly does not contemplate the allowance of a writ of error to any appellate tribunal, but only to review the final judgment of the court before which the respondent was tried, where such judgment could not otherwise be reviewed by writ of error or appeal. It is the final judgment of a trial court that may be reëxamined upon the application of the respondent, and it is to that court that the cause is to be remanded, and by that court that the judgment of this court is to be carried into execution. The obvious object was to secure a review by some other court than that which passed upon the case at *nisi prius*. Such review by two other courts was not within the intention, as the judiciary act of March 3, 1891, shows. This is made still clearer by the further provision that no such writ of error 'shall be sued out or granted unless a petition therefor shall be filed with the clerk of the court in which the trial shall have been had during the same term or within such

time, not exceeding sixty days next after the expiration of the term of the court at which the trial shall have been had, as the court may for cause allow by order entered of record.' This language is entirely inapplicable to the prosecution of a writ of error to the judgment of an appellate tribunal affirming the judgment of the trial court. And the case before us shows this."

It is true that in the present cases the writs of error were sued out directly to the trial court, whereas in the case of *Cross* the writ of error was taken to the judgment of the Supreme Court of the District affirming the judgment of the trial court, and therefore some of the language quoted from the opinion in the latter case is not strictly applicable. But the reasoning of the court, showing that it was unlikely that Congress intended a review by two other courts than the trial court, is applicable. It is not to be supposed that Congress, when it provided by the act of March 1, 1895, for a review or writ of error in the Court of Appeals for Indian Territory, regarded the sixth section of the act of February 6, 1889, as also applicable.

The counsel for the defendants in error cite in their briefs the fifth and thirteenth sections of the act of March 3, 1891, establishing the United States Circuit Courts of Appeals, providing that appeals or writs of error may be taken from the District or Circuit Courts direct to the Supreme Court of the United States in cases of capital crimes, and providing that appeals and writs of error may be taken from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States, or to the Circuit Court of Appeals in the Eighth Circuit, in the same manner and under the same regulations as from the Circuit or District Courts of the United States.

Of course as, when this act was passed, the United States court in the Indian Territory had no jurisdiction over capital crimes, Congress did not contemplate any appeal or writ of error in such cases. And when, by the act of March 1, 1895, jurisdiction of the United States court in the Indian Territory was extended to capital cases, and a court of appeals was

established, with power to entertain appeals and writs of error, the act of March 3, 1891, cannot be regarded as applicable in such cases. Where a statute provides for a writ of error to a specified court of appeals it must be regarded as a repeal of any previous statute which provides for a writ of error to another and different court.

The decisions of the Court of Appeals of the United States in the Indian Territory are final except so far as they are made subject to review by some express provision of law. In the eleventh section of the act of March 1, 1895, it is provided that "appeals and writs of error from the final decision of said appellate court shall be allowed, and may be taken to the Circuit Court of Appeals for the Eighth Judicial Circuit in the same manner and under the same regulations as appeals are taken from the Circuit Courts of the United States;" but it is not claimed by the counsel for the plaintiff in error that this provision applies to capital cases; and see the case of *Folsom* v. *United States*, 160 U. S. 121.

It has been held by this court that the court established in the Indian Territory, though a court of the United States, is not a District or Circuit Court of the United States. *In re Mills*, 135 U. S. 263, 268.

We accept the contention of the Solicitor General on behalf of the Government, that the Court of Appeals in the Indian Territory, being a court of the United States, is analogous to the Supreme Court of the District of Columbia, and bears the same relation to the trial court in the Indian Territory as the Supreme Court of the District of Columbia bore to the trial court in the District.

And it was held in *Ex parte Bigelow*, 113 U. S. 328, 329, that no appeal could be taken or writ of error sued out to the Supreme Court of the District of Columbia in a capital case, the court saying: "No appeal or writ of error in such case as that lies to this court. The act of Congress has made the judgment of that court conclusive, as it had a right to do, and the defendant, having one review of his trial and judgment, has no special reason to complain." *In re Heath*, 144 U. S. 92; *Cross* v. *Burke*, 146 U. S. 82, 84.

Statement of the Case.

Our conclusion is that we have no appellate jurisdiction of capital cases from the United States court for the Northern District of the Indian Territory, and that such appellate jurisdiction is vested exclusively in the United States Court of Appeals in the Indian Territory.

The motion is allowed and the writs of error in these cases are

Dismissed.